THE

York Legal Record.

A Record of Cases Decided in the Courts of York, York County, Pa. With Reports of Important Cases in other Counties and Abstracts of Decisions made throughout the State.

ALLEN C. WIEST, Editor.

VOLUME XXXI.

YORK, PA.:
YORK LEGAL RECORD PRINT,
1917

TABLE OF CASES

REPORTED IN THIS VOLUME

York Legal Record

Vol. XXXI JULY, 1917 No. 1

COMMON PLEAS

Bruggeman et al. v. City of York. No. 3

Negligence—Liability of Municipality for Condition of Strect.

Plaintiff brought suit to recover damages for loss of eyesight caused by filth from a gutter in a city street entering her eye, by reason of the catching of a broom with which she was trying to clean the gutter. The jury found for the plaintiff and defendant moved for judgment *n. o. v.* HELD, that the motion must be refused.

That the accumulation in the gutter, caused by defendent's carelessness, was poisonous and productive of disease and infection, and that plaintiff's eye was injured thereby, is not denied.

The salient elements of the cause of action was that the condition was created by the careless act of the defendant and, although it was notified of that condition, it carelessly and negligently allowed it to remain and made no effort to change it or remedy its harmful effect.

The jury having decided that the defendant was careless and negligent; that that carelessness and negligence resulted in the accumulation of a substance containing filth, poisonous and infectious disease germs; that as a result, the plaintiff was injured by some of it which splashed into her left eye, the motion for judgment for the defendant *n. o. v.* must be overruled.

No. 125, August Term, 1914.

Motion by defendant for judgment *non obstante veredicto.*

The raising of the grade of a lot on which defendant city was erecting a fire engine house, and the filling and bridging of a gutter for the purpose of more readily entering on the lot, resulted in three suits against the city defendant.

The first was brought to recover damages to plaintiff's property by reason of the obstructions and change of grade. This resulted in a verdict for the plaintiff. A motion for judgment for defendant *n. o. v.* was refused by the court; see Bruggeman v. City of York, 29 YORK LEGAL RECORD 85; and the judgment entered on the verdict was affirmed by the Superior Court; City of York's Appeal, 30 YORK LEGAL RECORD 53.

The second suit was brough to recover damages for the death of plaintiffs' son, alleged to have been caused by the unsanitary condition of the street and plaintiffs' premises by reason of the obstructions in the gutter. The court entered a compulsory non-suit and refused to take off the same; Bruggeman et al. v. City of York, 29 YORK LEGAL RECORD 19, and the Supreme Court affirmed the judgment; Bruggeman's Appeal, 30 YORK LEGAL RECORD 48.

The third suit sought to recover damages for the loss of sight suffered by one of the plaintiffs caused by some of the stagnant water and filth in the gutter penetrating her eye. The jury having found for the plaintiff, a motion for judgment *n. o. v.*, was made. A motion to have that motion heard by the court in banc, was refused; Bruggeman et al. v. City of York, No. 2, 30 YORK LEGAL RECORD 205. This motion for judgment *n. o. v.* was heard by the trial judge.

Jno. L. Rouse for motion.

Niles & Neff, contra.

March 26th, 1917. ROSS, J.—This suit was brought to recover alleged damages from the City of York for an injury alleged to have been caused by the negligence of the said City of York.

The plaintiff's evidence was to the effect that the plaintiffs lived at the corner of Jessop Place and Rose Alley in the defendant City. The defendant caused to be erected a fire engine house opposite the said residence and in the course of the work raised the level of the lot upon which the engine house was erected and in so doing caused water that formerly passed over its surface to collect in front of plaintiff's dwelling and remain there and collect drainage water and filth of various kinds which became stagnant. That the water and filth so collected contained various poisons and germs and disease, contagion and infection, which, if brought into contact with the eye or other unprotected parts of the human body, would naturally, probably and usually produce such infection and disease as destroyed the sight of the plaintiff, Mary Ellen Bruggeman.

That the dangerous and obnoxious accumulations were made known to the defendant by frequent notices given to its representatives prior to the 21st of October, 1912.

That the said accumulation and condition was caused by the act of the municipality in filling up a brick gutter which, before the raising of the grade of the lot of the engine house, had been constructed by the City,

for the purpose of carrying the water across Jessop Place, from whence it flowed naturally on to lower ground.

That the filling of this gutter was for the purpose of bridging the gutter and more readily hauling material on to the raised surface of the engine house lot. That the obstruction or dam thus created, was negligently permitted by the City and no attempt was made to relieve the plaintiffs from the baneful effect of the alleged nuisance, until after the accident, for which this suit was brought, happened.

That on October 21st, 1912, at about four o'clock in the afternoon the plaintiff, Mary Ellen Bruggeman, was engaged in removing from the gutter in front of her dwelling, the said accumulation and in so doing, while using a broom, a wire which was imbedded in the mud and filth which she was trying to remove, caught in the broom and as a consequence some of the accumulated filth splashed in her face and into her left eye; as a consequence the sight of the eye was so impaired that she is unable to perform her household duties and other duties and necessary employments, as she had done before the happening of the accident. Evidence of pain and suffering, doctor bills, &c., were testified to.

The defendant produced some witnesses evidently for the purpose of discrediting the testimony of the plaintiff, Mary Ellen Bruggeman, as to the cause of the injury to her left eye, and to discredit the plaintiff's evidence as to the liability of the City of York; but much of the testimony given in support of plaintiffs' allegations as submitted to the court in their statement filed, was not directly contradicted by defendant's witnesses. The theory upon which the defense seemed to be based was that the defendant being a municipality was not liable for damages for personal injury in the maintenance of its highways and that the plaintiff's evidence showed that the catching of the wire in plaintiff's broom caused the splash which caused the injury, therefore the alleged negligence of the City was not the proximate, but the remote cause of the accident.

At the close of the plaintiff's evidence the defendant moved for compulsory non-suit, which motion was overruled; and, at the close of all the testimony the defendant presented points asking for binding instructions for the defendant; those points were refused.* The court submitted the facts to the jury and a verdict was rendered for the plaintiffs.

The motion for a new trial made by the defendant, was formally withdrawn at the time of the argument on the motion for judgment for the defendant *non obstante veredicto.*

So that no specific errors of the court's rulings or charge to the jury were designated or argued to the court, except the refusal to give binding instructions for the jury to render a verdict in favor of the defendant.

The propositions, upon which the motion for judgment *non obstante veredicto* is based, as advanced by defendant's counsel at the argument, are as follows:

"1. The alleged negligence of the City in permitting the highway to be and remain in an unsanitary condition, was not the proximate cause of Mrs. Bruggeman's injury."

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* The points were as follows:

1. The negligence alleged against the City of York in the pleadings and in the testimony on behalf of the plaintiff, is the maintenance of a stagnant pool of mud on the highway in front of the plaintiff's property. The natural and probable consequence of such negligence, even if proven, is not an injury to the eye such as happened to Mary Ellen Bruggeman. one of the plaintiffs; but such injury, if her testimony be believed, was the result of the entanglement of a wire spring in a broom with which she was attempting to clean the gutter in front of her premises. The existence of this wire and the disentangling of the same from the broom. could not have been reasonably foreseen by the defendant and, therefore, the verdict must be for the defendant.

Answer—For the present this point as written is refused.

2. If the jury believe that the accident was caused in the manner described by Mary Ellen Bruggeman, the plaintiff, she has no right of action therefor against the City of York, because said City is not liable for injuries to the person of the plaintiff caused by its neglect of sanitary precautions on the highways.

Answer—Point refused.

3. The evidence of the plaintiff's physicians is uncertain and inconclusive that the germs which caused the injury to the plaintiff's eye came from the mud which splashed into her eye in the manner described by said plaintiff and, therefore, the verdict should be for the defendant.

Answer—Point refused.

4. Under all the evidence the verdict of the jury should be for the defendant.

Answer—Point refused.

"2. There is no liability on the City for injuries resulting to health or life of occupants of abutting property by reason of unsanitary condition of the abutting highway."

We will first consider the second proposition.

The success of the plaintiff's case could not depend alone upon the mere condition of the abutting highway, but the salient elements of the cause of action was that the condition was created by the carless act of the defendant and, although it was notified of that condition, it carelessly and negligently allowed it to remain and made no effort to change it or remedy its harmful effect.

The plaintiff's evidence was obviously intended to prove not only the condition of the highway but all other elements of the cause of action. All of the evidence was submitted to the jury, and the court repeatedly instructed in the charge, that, "it is incumbent on the plaintiff, to show, by the weight and preponderance of all the evidence, before they could recover; first, that the negligence complained of was the actual negligence of the defendant; secondly, that because of that negligence the damage complained of was incurred," and, "unless, by a preponderance or weight of the evidence, the plaintiffs will have convinced you of those two things, thesetwo elements, it will not be necessary for you to go further but find a verdict for defendant."

The jury found in favor of the plaintiffs.

It has been decided that, "A verdict and judgment for plaintiff will be sustained where the evidence shows that the City diverted water from its own lot and unnecessarily dammed up the natural course of the flow of water in the alley, and cast the water upon the plaintiff's property; Bruggeman v. City of York, 63 Pa. Sup. Ct. 542.

"Municipal corporations are liable for the improper management and use of their property to the same extent and in the same manner as private corporations and natural persons;" Powers v. The City of Philadelphia, 18 Pa. Super. Ct. 621; Morgan v. Duquesne Boro., 29 Pa. Sup. Ct. 103; Briegel v. Philadelphia, 135 Pa. 451.

The instructions as to the method of finding, from the evidence, whether or not the City was negligent or careless in the erection of its engine house, the raising of the level of the lot upon which it was erected, the bridging or filling of the gutter for the purpose of more readily reaching the raised grade of the lot and allowing that obstruction to remain, were not specifically excepted to, and we take it for granted that the defendant was satisfied with them. The verdict of the jury convicts the defendant of carelessness. That the accumulation caused by that carelessness, was poisonous and harmful and productive of such disease and infection, as the plaintiffs claimed the injury to Mrs. Bruggeman's eye was caused by, was not denied by defendant's evidence, and if it was denied, the jury decided in the affirmative; that a portion of that accumulation went into the eye of Mrs. Bruggeman and destroyed its sight, was not directly denied by the defendant's evidence and if it was denied, the jury decided in favor of the plaintiffs' claim.

An analysis of the verdict, after a close study of the evidence submitted, results in the conclusion that the jury decided that the defendant was careless and negligent; that that carelessness and negligence resulted in the accumulation of a substance containing filth, poisonous and infectious disease germs; that as a result, when the plaintiff, Mrs. Mary Ellen Bruggeman, attempted to remove it from the premises of her dwelling, she was injured by some of it which splashed into her left eye.

It will be observed that the defence of contributory negligence has not been interposed in this case, either by the pleadings, or at any stage of the trial; and we take it for granted from our interpretation of the expressions of defendant's counsel, at the argument, that no such defence is depended on.

The other question raised by the defendant's motion for judgment, notwithstanding the verdict, is that raised by the defendant's counsel at the argument in the fisrt reason assigned in support of the motion. Was the injury the direct or proximate result of the defendant's negligence, or was there such an independent and intervening agency, over which the defendant had no control, which caused the accident to happen which rendered the carelessness of the defendant the remote and not the proximate cause.

The rule is, "that in order to recover for injuries alleged to have been caused by negligence, the injury must be the natural and probable consequence of the negligent act;" Rhad v. Duquesne Light Co., 255 Pa. 409.

The argument advanced by defendant's counsel in his brief and by oral argument

was founded upon an excerpt from the testimony of Mrs. Bruggeman, found on pages 5 and 7 of the stenographer's transcript, which is as follows:

"Q. Now, what did you do before October 21st to clean up that condition? A. Well, I used to take a rake and try to get the thickest part out on piles on the street, and I thought the City carts would take it along, and I tried with a broom to get the other thicker part by, thinking the water would find a way, some way to get out.

"Q. What did you do on the 21st of October, 1912? A. On the 21st of October, 1912, I taken my rake and I had raked all of the heaviest dirt and filth out, and I then had taken the broom and tried to push the rest of the mud and things out so that it would drain, and in doing so my broom came in contact with something in the mud and splashed the filth in my eye and over my face."

Q. Now, your broom struck a wire. A. It struck a wire in the mud, yes sir.

Q. And this wire became fastened in the broom? A. Yes, sir.

Q. In some way or other, and you discovered that in one of the movements of the broom¿ A. After I pushed it on the embankment; after I pushed the mud and stuff out of the way.

Q. What kind of a wire was this? A. It appeared to be a wire out of a broom, or a blind screen; just a thin twisted wire.

Q. Did it seem to spring? A. It seemed that way because it struck right back.

Q. This wire was fastened in the dirt? A. No, in the mud.

Q. The one end was caught in the mud or in the bricks? A. It had some hold some way in the mud because one end held on to the broom.

Q. And you were trying to get this wire loose when it flew back into the mud? A. I do not think I had a chance to go that far.

Q. You made no motion to unloosen it at all? A. I did not make any motion because I would not stoop over the filth in the gutter.

Q. Where were you standing? A. On the curb.

Q. And this mud was in the cement gutter? A. Yes, sir, in the cement gutter.

The trial judge left that evidence, together with all other evidence in the case for the jury to determine the proximate cause. The defendant has not specifically excepted to the charge, and, as we understand, does not now complain of any inadequacy of the charge in that respect. In effect, the verdict decided that the negligence was the direct and proximate cause of the injury. The counsel argue that as the facts were undenied, it was the duty of the court to decide that the catching of the wire in the broom of the plaintiff, Mrs. Bruggeman, resulted in the splashing of the substance into her eye, and was the proximate cause of the injury.

The only evidence as to the happening of the accident was the testimony of Mrs. Brugueman that, "On the 21st of October, 1912, I taken my rake and I had raked all of the heaviest dirt and filth out, and I then had taken the broom and tried to push the rest of the mud and things out so that it would drain, and in doing so my broom came in contact with something in the mud and splashed the filth in my eye and over my face."

When defendant's motion for compulsory non-suit was made, the trial judge was not clearly informed by the evidence that the wire imbedded in the mud was not such a thing as might have been foreseen. It had been testified that little chickens and tin cans had been washed to the same place, and were held there by the alleged obstruction which was attributed to the defendant's negligence; there was no description of the wire except that which was given by the evidence of Mrs. Bruggeman; and it was not made clear whether or not it was concealed in the mud or whether it was in such a conspicuous position as might have rendered it so obvious to Mrs. Bruggeman that she could have prevented the accident by using proper care. For these reasons the motion was overruled. The defendant's evidence did nothing to enlighten the court on those matters, nor did it show how the wire was placed in the mud, so the question of proximate cause was left to the jury to decide.

"Whenever there is a conflict of testimony or for any cause there is a reasonable doubt as to the facts, or as to the inference to be drawn from them, negligence is always a question for the jury:" Graham v. Phila., 19 Pa. Sup. Ct. 292.

"Whoever does a wrongful act is answerable for all the consequences that may ensue in the ordinary and natural course of events though such consequences be immediately brought about by intervening causes, if such intervening causes were set in motion by the

original wrongdoer:" Cameron v. Citizens Traction Co., 215 Pa. 191; Laughlin v. Penna. R. R. Co., 240 Pa. 178; Siever v. Pittsburg, Cincinnati, Chicago and St. Louis Railway Co., 252 Pa. 10; Central D. & P. T. Co. v. Otis El. Co., 54 Pa. Sup. Ct. 654, (opinion by President Judge Rice, in which he quotes from McGrew v. Stone, 53 Pa. 436).

We are of the opinion that the question of proximate cause was properly decided by the jury under the evidence of this case.

As there are no specifications of error of admission or rejection of evidence at the trial, and no specific objection or exception to the charge of the court, there is nothing else to dispose of in the present inquiry.

And now, motion for judgment *non obstante veredicto*, is refused.

C. P. of Delaware Co.

Chester City v. Prendergast.

Municipel Lien—Charitable Institution—Parochial Play-ground—Acts of 4 June, 1901, P. L. 364, and of 19 March, 1903, P. L. 42.

A playground, connected with a parochial school which dispenses education to the public freely and without discrimination, is an institution of purely public charity, within the Acts of 4 June, 1901, P. L. 364, and 19 March, 1903, P. L. 42, and is not subject to tax or municipal claims.

Rule for judgment for want of a sufficient affidavit of defense.

A. A. Cochran, City Solicitor, for rule.

J. E. McDonough, contra.

November 27, 1916. BROOMALL, J.—This is a scire facias sur municipal lien. The lien was filed on February 19, 1914, against Patrick J. Ryan, for the paving of the roadway of Fourth Street, opposite a lot of land at the Southeast corner of Fourth and Hayes Streets, in the Eleventh Ward of the City of Chester. The question presented is whether the land sought to be charged is exempt by the Act of June 4, 1901, P. L. 304, Section 5, which is re-enacted and extended to townships of the first class by the Act of March 19, 1903, P. L. 42, and appears in the Digest as the Act of March 19, 1903, Stewart's Purdon, Vol. 4. page 4663, pl. 265, which is "actual places of religious worship * * * and institutions of purely public charity shall not be subject to tax or municipal claims, except for the removal of nuisances, for sewer claims and sewer connections, or for the re-curbing, paving, repaving or repairing the footways in front thereof." It appears by the affidavits of defence that the ground sought to be charged is on the opposite side of a street from the church building, but is annexed thereto, presumably the titles on each side extend to the middle of the street. That the church building is not only used as a place of religious worship, but is also used as a place of instruction to the young, publicly, freely and indiscriminately, that is to say a public charity. That the ground in question is used as a play-ground for the school children, who are taught in the church, and is necessary for such use. That the legal title of the ground and church is in the head of the church for the use of its members, who maintain the school, from which no profit is derived. The concrete question is whether this school, with the play-ground, which is averred to be a necessary adjunct, is a purely public charity. The fact that the school is conducted in a part of the church building rather tends to add to its immunity than to detract from it. A charity was defined by Mr. Binney in the Girard Will case, and since recognized by legal writers, to be whatever is given for the love of God, or for the love of your neighbor, in the Catholic and universal sense; given from those motives, and to those ends, free from the stain or taint of every consideration that is personal, private or selfish. Free dispensations of education are charities, as in the Girard bequest, quite as much as other dispensations for the good of mankind. If this particular charity should not be permanent and perpetual, the exemption will cease when the charity ceases.

In White v. Smith, 189 Pa. 222, it was conceded that a parochial school was exempt from general taxation as a charitable institution of learning under the Act of May 14, 1874, P. L. 158, and that the necessary adjunct of a convent building used for housing the teachers who taught in the school was also exempt. It seems to us that if a charitable parochial school considered as an institution of learning is exempt from general taxation under the Act of 1874, such school is also exempt from municipal claims as a

public charity under the Act of 1901; and if a convent building for housing teachers is a necessary adjunct of such school, so also may a play-ground for the school children be a necessary adjunct. At all events upon this motion it must be so taken, because it is so averred.

We, therefore, refuse plaintiff's motion for judgment.

C. P. of Lehigh Co.

Loux Creamery Co. v. Tice et al.

Corporations—Directors—Illegal Dividends Acts of July 18, 1863, P. L. (1864) 1102, and April 29, 1874, P. L. 73.

The liabilities of officers and directors of a corporation, delinquent in the performance of their duties as such, must be determined in the mode provided by the Act of July 18, 1863, P. L. (1864) 1102, and April 29, 1874, P. L. 73.

They are not assets of the corporation so as to give a general receiver authority to enforce them through a proceeding in equity.

Motion to change decree.

Frank Jacobs and *M. P. Schantz* for plaintiff.

George W. Aubrey, Butz & Rupp, Ira T. Erdman and *Calvin E. Arner* for defendants.

October 2, 1916. GROMAN, P. J.—The receiver of the Loux Creamery Company, a Pennsylvania corporation, filed his bill in equity, alleging that certain unearned dividends were paid by the board of directors from time to time, and that other payments were made negligently and by connivance by the defendants as directors of the corporation.

After taking the testimony of the complainant, the court, under Rule 68 of the equity rules, entered a decree of dismissal without hearing evidence on behalf of the defendants. The plaintiff filed a motion to change the decree dismissing the bill.

The one question going to the marrow of the controversy, if the jurisdiction lies, is—have the directors of this corporation, in the performance of their duties, exercised reasonable and ordinary care, skill and diligence in conducting the business of the corporation? If they did, there could be no recovery. During the taking of the testimony, it was conceded that certain of the directors could not be held liable, but an effort was made to bring home liability on the part of Wilson M. Loux, a director, book-keeper and the manager of the corporation. While an appearance of wrong doing may be established, this with nothing more, would not be sufficient to establish fraud; that fraud must be proven and cannot be presumed is so evident a legal maxim that a citation of authorities would be superfluous.

It is hardly worth while, however, to pursue the foregoing inquiry any further, as we have legislation in Pennsylvania indicating the proceedure to be followed to establish the liability of the officers and directors of a corporation, delinquent in the performance of their duties as such. Sections 41 and 42 of the Act of July 18, 1863, P. L. 1102, 1864, read as follows: "Sec. 41. No stockholder, or officer in such corporation, shall be held liable for its debts, or contracts, unless a judgment is recorded against it, and the corporation shall neglect, for the space of thirty days after demand made, on execution, to pay the amount due, with the officer's fees, or exhibit to him real or personal estate of the corporation subject to be taken on execution, sufficient to satisfy the same, and the execution shall be returned unsatisfied.

Sec. 42. After the execution shall be so returned, the judgment creditor, or any other creditor, may file a bill in equity, in behalf of himself, and all other creditors of the corporation, against it, and all persons who are stockholders therein at the time of the commencement of the suit in which judgment was recovered, or against all the officers liable for its debts and contracts, for the recovery of the sums due from said corporation, to himself and such other creditors, for which the stockholders or officers may be personally liable, by reason of any act or ommission, on its part, or that of its officers, as stated in preceding Sections of this act, setting forth the judgment and proceedings thereon, and the grounds upon which it is expected to charge the officers or stockholders, personally."

The Act of April 29, 1874, P. L. 73, Section 39, reads as follows: "If the directors of any company declare any dividend when the company is insolvent, or the payment of which would render it insolvent, they shall be jointly and severally liable for all the debts of the company then existing, and for all thereafter contracted, so long as they respectively continue in office: Provided, that the amount for which they shall be liable shall not exceed the amount of

such dividend, and if any of the directors are absent at the time of making the dividend, or object thereto, at said time, and file the objections in writing with the clerk of the company, they shall be exempted from such liability."

Relative to the matters under consideration, and having the above legislation in mind, it may be illuminating as well as instructive at this time to quote from Childs v. Adams, 43 Pa. Sup. Ct. 236 (1910), "Where the president and treasurer of a corporation are permitted to control and manage the whole business of a corporation without any interference by the directors or stockholders, and they declare and distribute dividends in good faith out of what they suppose is profits, although the company is in fact insolvent, they cannot be compelled to pay back the sums thus distributed to the corporation by a bill in equity filed against them by the general receiver of the company. Their only liability is to the creditors who must first have the amount of their indebtedness adjudicated in an action against the corporation, and then file their bill for themselves and other like creditors against the officers who may have made the illegal payments.

The liabilities of the officers and directors of a corporation specially imposed upon them by the statute, are not assets of the corporation so as to give a general receiver authority to enforce them."

The dismissal of the bill must be sustained for want of jurisdiction.

Motion to change the decree dismissing the bill in the above cause, dismissed.

C. P. of Dauphin Co.

American Lumber & Mfg. Co. v. Ensminger Lumber Co.'s Receivers.

Service of statement—Time of filing affidavit of defence—Practice Act of May 14, 1915, P. L. 483.

The practice Act of May 14, 1915, P. L. 483, presupposes an action already brought in the Court of Common Pleas. The statement is the first step in the procedure when the action has been commenced.

Service of the statement is recognized and authorized by necessary implication.

There is no prohibition against filing the statement before the return day, and defendant thus may be compelled to file an affidavit of defence before the return day or before he is in Court pursuant to the writ of summons.

Service of statement of claim may be made by serving a copy on defendant.

Receivers of U. S. District Court may be sued without first obtaining leave of Court.

Affidavit of defence praying that service of statement of claim be set aside and statement stricken from record.

H. Shoemaker and *George L. Reed* for plaintiffs.

C. H. Bergner for defendants.

February 2, 1917. KUNKEL, P. J.—The defendants have filed their affidavit of defence, in which they pray that the service of the statement of claim may be set aside and the statement stricken from the record. It is urged that there is no provision in the practice act of May 14, 1915, P. L. 483, directing where the statement shall be filed nor authorizing it to be served; that it may not be filed and served so as to require an affidavit of defence before the return day of the original writ; and that the service of the statement, having been made by serving a copy thereof on the defendants, is defective. It is also objected that the plaintiff has not obtained leave from the United States district court, whose receivers the defendants are, to bring this action against them.

As to the objection that the act fails to expressly direct where statement of claim shall be filed it is sufficient to say that the act prescribes the procedure to be observed in actions brought in the court of common pleas. It contemplates the commencement or the pendency of an action in that court. It, therefore, necessarily follows that the plaintiff's statement of claim is to be filed in an action there commenced or pending. Under the statute the statement is the first step in the procedure when the action has been commenced.

It is true there is no express direction in the act that the statement shall be served, but it is provided that an affidavit of defense shall be filed by the defendant within fifteen days from the day when the statement was served. Thus service of the statement is recognized and authorized by necessary implication.

It is also true that there is no time fixed when the statement shall be filed. Nothing is said in the act whether it shall be filed before or after the return day; but there is no prohibition against filing it before the return day. Therefore we would not be justified in limiting the act by holding that it may not be filed before that time. But it is urged, that if the act be interpreted to permit this to be done the defendant would

be compelled to file an affidavit of defense in many cases, as in the present one, before the return day or before he is in court, pursuant to the command of the original writ. This situation, however, is not without precedent in the history of legal procedure in this state. Under the act of June 16, 1836, a rule of reference may be entered and the defendant required to answer before the return day; Henness v. Meyer, 4 Wharton 358; Fehr v. Reich, 36 Pa. 472. This decision was placed upon the ground that there was no prohibition in the act of 1836 against such a practice. Under the act of April 19, 1901, P. L. 88, regulating the practice in replevin, the defendant may be required to file his affidavit of defense to the plaintiff's declaration even though the statutory time for filing the affidavit expires before the return day of the writ, and judgment for want thereof before the return day is not premature; Griesmer v. Hill, 225 Pa. 545. And under the act of May 25, 1887, P. L. 271, relating to procedure, §§4 and 6, the plaintiff's statement is permitted to be filed before the defendant is in court in answer to the command of the summons, but by express enactment the defendant is given until the return day to file an affidavit of defense. The practice act of 1915 would be no advance in speeding litigation upon the act of 1887 or prior legislation on the subject if we were to hold that nothing can be required of the defendant toward this end before the day on which he is commanded to appear. *

The service of the statement of claim was made by serving a copy thereof on the defendants. In the absence of any provision in the act prescribing the manner of service we see no reason why a service which followed the usual practice should not be sustained.

The right of the plaintiff to commence and maintain this action against the receivers of the district court, without first obtaining the court's leave, is fully warranted by the act of congress of August 13, 1888; Hallowell v. Williams, 217 Pa. 501.

The prayer to set aside the service and to strike the statement of claim from the record is denied. The defendants, under §20 of the act under consideration, may file a supplemental affidavit of defense to the averments of fact con ained in the statement within fifteen days from this date.

* See. Brownsworth & Co. v. Sulkin, 30 YORK LEGAL RECORD 181, where the opposite view was taken.

C. P. of . Allegheny Co.

Sweeney v. Allegheny County.

Pleading and Practice—Municipal Corporations—Affidavit of Defense—Act of May 14, 1915, P. L. 483.

It would seem that under the Practice Act of 1915, the Legislature intended to require uniformity of pleadings in all actions of assumpsit and trespass regardless of the personality of the parties, whether individual or corporate, except as therein designated, and municipal corporations are not exempt from its provisions.

In re rule to strike off endorsement on statement to file affidavit of defense.

Rody P. & M. R. Marshall for plaintiff.

Beatty, Magee & Martin for defendant.

February 23, 1917. DAVIS, J.—The defendant has taken the following rule on the plaintiff, viz: "To show cause why the endorsement on the statement of claim filed by plaintiff in this case requiring the defendant to file an affidavit of defense within fifteen days should not be stricken from the record, proceedings to be stayed in the meantime pending the disposal of the rule."

This is an action of assumpsit, and the defendant contends that it cannot be required to file an affidavit of defense under the provisions of the "Practice Act, nineteen fifteen," P. L. 483; that prior legislation and decisions places the defendant in the class of municipal corporations which were exempted from filing affidavits of defense in actions of law, and that the "Practice Act does not repeal by implication the acts exempting municipal corporations from filing an affidavit of defense."

Section 25 of the Act, however, provides "all acts or parts of acts inconsistent with the provisions hereof are repealed."

The Act is an Act entitled, "An Act relating to practice in the Courts of Common Pleas in actions of assumpsit and trespass, except actions for libel and slander; prescribing the pleadings and procedure to be observed therein; and giving the courts power to enforce its provisions."

The Act relates to "pleadings and proceedings to be observed" by plaintiff and defendant in the two forms of action.

Section 7 defines the nature of the affidavit to be filed by persons who are parties acting in a representative capacity; and section 13 defines in actions of trespass the

effect of not filing an affidavit of defense on the part of the defendant.

This Act is comprehensive in specifying the only pleadings now to be used in the two forms of action. Sections 3 and 4 abolishes all other pleas and demurrers.

It would, therefore, seem under this Act that the Legislature intended to require uniformity of pleadings in all actions of assumpsit and trespass regardless of the personality of the parties, whether individual or corporate, except as therein designated.

To hold that the defendant does not come within the provisions of this Act leaves all municipal corporations outside of all pleadings in the two forms of action unless required to conform to the provisions of the same. The Act does not exempt them as parties from its provisions, and necessity does not require such exemption.*

C. P. of Northumberland Co.

Gorli & Co. v. Perfect Silk Throwing Co

Replevin—Lien on personal property for work bestowed thereon—Motion n. o. v.

In the absence of a special agreement, a tradesman has a lien for work done on goods deposited with him for manufacture.

Where there is a contract to manufacture several articles at an agreed price, the tradesman has a lien upon any one or more of the articles in his possession for labor bestowed upon other articles embraced in the contract.

Where under a contract for finishing goods for manufacture by lots, it is disputed as to whether or not several separate shipments comprise a single lot, the question is for the jury.

Action of Replevin.

Voris Auten for the Plaintiff.
J. W. Gillespie for the Defendant.

February 26, 1917. MOSER, J.—In this action the plaintiff shipped six bales of raw silk to the defendant to be thrown or twisted at the defendant's throwing plant in Elysburg, this County. Three of the said bales were worked and finished and were subsequently forwarded by the defendant, at the instance of the plaintiff, to the Summit Silk Company. The defendant refused to throw the remaining three bales, contending that the silk contained in all of the six bales was of a much inferior grade than that agreed upon and could not be thrown at the price fixed by the parties without serious loss to the defendant. The plaintiff issued this writ of replevin to obtain possession of the said remaining three bales and the defendant resisted the delivery thereof, contending that it had a special or qualified property therein for the value of the work done on the three bales delivered to the Summit Silk Company as aforesaid. The plaintiff disputes any qualified property or interest whatever of the defendant in the silk taken by the sheriff under the writ: 1st, because, under the terms of the contract, the defendant was not to be paid until after the silk had been thrown and shipped; 2nd, because the three bales seized by the sheriff were a separate and distinct shipment; that any lien that the defendant might have had for work done was special and not general, and therefore, these three particular bales could not be held for previous work done on the other bales.

From the agreement and course of dealing between these parties, as disclosed by the testimony, it appears that after the defendant completed its work in the treatment of the raw silk, the product was forwarded by the defendant to whomsoever the plaintiff directed it should be shipped. When the defendant delivered the finished material it sent a bill for the services rendered to the consignee and a duplicate thereof to the plaintiff. The work was paid for thereafter and the settlements at times extended for a period of thirty or sixty days. The plaintiff takes the position that the defendant acquired no special property in said silk under the conditions thus disclosed, by virtue of the doctrine enunciated in Lee v. Gould, 47 Pa. 398, where it was held that "A tanner who contracts to tan hides furnished him by a firm, and to return the leather made from them, in a reasonable time, at a price agreed on for tanning and transportation, payable after delivery, has no property in the leather, after it is finished and ready for delivery, such as will justify its detention by him."

In that case there was a special agreement, which is not the situation in the case here being considered. The customary and usual business methods ordinarily in vogue in like transactions were pursued in the dealings

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* An amendment to the Practice Act of 1915, approved May 3, 1917, provides "that counties, cities, boroughs, townships, school districts and other municipalities shall not be required to file an affidavit of defense."

had between these parties. The work was to be paid for after it was performed and after the silk was delivered in accordance with the shipping directions of the plaintiff. In the absence of any special agreement the defendant did not waive its right to a qualified property in the goods for the services rendered; Mathias v. Sellers, 86 Pa. 486.

Under the instructions given, the jury found by their verdict that the raw silk furnished by the plaintiff in the six bales above referred to was inferior in quality to the grade contemplated by the parties in their contract. The furnishing of this inferior silk that could be thrown only at a loss to the defendant was not a compliance with the terms of the agreement entered into between the parties hereto but was a violation thereof; therefore the plaintiff is not in a position to complain that the defendant waived its right to a lien by virtue of an agreement which the plaintiff disregarded and which was abrogated by the plaintiff's own conduct.

The jury found that the six bales of silk numbered respectively 1797, 1938, 1932, 1940, 1941 and 1942, comprised what was designated by the parties as one lot, being lot numbered 2438. It is true, as plaintiff contends, that these bales were not received by the defendant in one shipment, but there was ample testimony to sustain the jury's finding that both the plaintiff and the defendant regarded the said six bales to be a single lot. That question was squarely submitted to the jury and their verdict is a complete answer to the plaintiff's assertion that the lien of the defendant was special and not general and that the particular bales taken by the sheriff could not be held for previous work done on other bales. So far as this case is concerned, the verdict of the jury established the fact that the six bales referred to comprised one single lot. That being their conclusion from the testimony we are of the opinion, that in the absence of some special agreement, the defendant had a qualified property in, or lien upon the three bales taken into possession by the sheriff under the writ, for the work done on the other three bales.

The plaintiff's motion for judgment *n. o. v.* is hereby overruled and an exception noted.

The same is believed to be true here and must be deemed decisive in plaintiff's favor. The only doubt in mind goes to the question of interest, if any, payable by defendant. As we understand the argument of counsel, it is agreed there never had been any formal surrender of the policy in manner required by its terms. Indeed there is only an equivocal and uncertain averment of that step in plaintiff's statement, met by a distinct denial of surrender in defendant's answer; although the company is not seeking to avoid liability on that ground. It does, however, contend that the fact ought to have weight on the question of interest; and that is believed to be true. In other words, to be entitled to damages for detention at the legal rate of interest, plaintiffs would have the burden of showing surrender in due form, or waiver thereof by the company. They do neither one. The omission is affirmatively pleaded by the company with the qualification that no advantage is sought to be taken of it except in mitigation of damages, so to speak, if the plaintiffs are in position to make a valid surrender.

The circumstances of the case make it an amicable action in everything but form, and suggest that substantial justice would be done by the payment of the principal sum together with such interest as may be presumed to have accrued to the fund in bank, say three per cent., pending the controversy.

Judgment accordingly.

C. P. of Lackawanna Co.

Cadden v. Equitable Life Assurance Society

Guardian and ward—Powers of guardian—Life insurance benefits.

Where beneficiaries named in a life insurance policy have the option to accept the surrender value of the policy, a guardian of minor beneficiaries is authorized by virtue of his office, and without any order of court, to accept the amount and give his receipt binding the wards, unless his powers in this respect are restricted by statute.

As between keeping a policy alive by paying the premiums, and accepting the surrender value at a given time, it is the duty of a guardian to elect whichever appears to be most beneficial to the ward.

To be entitled to damages for detention at the legal rate of interest, the beneficiary has the burden of showing surrender of the policy in the manner required by its terms, or waiver thereof by the company.

Motion for judgment.

R. A. Zimmerman, for plaintiffs.

Warren, Knapp, O'Malley & Hill, for defendant.

April 23, 1917. NEWCOMB, J.—The action is assumpsit for the surrender value of a paid-up policy of life insurance issued

July 21, 1896, to M. A. Cadden on what is known as "the twenty-year distribution plan." That is to say, the contract called for the payment of $2,500 to the designated beneficiaries upon the death of the assured, with the privilege at the end of the first twenty years, during which the premiums were payable, to surrender the policy for a value to be computed as therein specified. The beneficiaries are the wife and children of the assured. In July last year, about the expiration of the twenty years, Cadden gave the company notice that he and his family elected to exercise this option. The company was then, and at all times since then has been, ready and willing to comply and pay the money; but three of the children being under legal age and joining in the election by their guardian, it was at a loss to know whether their rights could be exercised by guardian in the absence of special authority from the orphans' court by which she was appointed. That is the single question at issue.

While the fact doesn't appear in the pleadings, it was disclosed at the argument that the orphans' court had declined to entertain a petition for such authority. That accounts for the law suit as the company is asking only that the powers of the guardian in the premises be defined in order that it may avoid eventual liability to the wards upon the death of their father.

It is agreed there is no statute on the subject and therefore the question is one of common law power.

As between keeping a policy alive by paying the premiums, and accepting the surrender value at a given time, it has been held to be the duty of a guardian to elect whichever appeared to be the most beneficial to the ward: Cocke v. Rucks, 34 Miss. 105; Martin v. Tarver, 43 Ib. 517; Chapman v. Tibbits, 33 N. Y. 289.

True, in this instance the policy was fully paid. But one can see no good reason on that ground why the like duty doesn't rest upon the guardian. If she decline to act, the result would be that during their minority the money of the wards would remain in the company's hands without interest, as it does not become payable until the policy is surrendered in due form; and thus the wards would sustain a loss. Looked at in its true light their interest has become a *chose* in action and it would seem to be the right and duty of the guardian to collect it as in case of any other indebtedness.

What appears to be essentially the same question has been distinctly ruled in the U. S. Supreme Court. In that case the policy was on the tontine dividend plan having a given surrender value at the completion of the dividend period. It was payable to the wife of the assured if then living, otherwise to his children "or their guardian for their use," etc. The wife died during the dividend period so that the claim for the surrender value eventually accrued to a minor child for whom the father was appointed guardian. He surrendered the policy, accepted the value, and gave the company a formal receipt. Later he died and was succeeed as guardian by one Maclay who sued the insurance company for the amount payable on the death of the assured. The question at issue was as to the validity of his predecessor's receipt. It was held to be good. While it is to be noted that the promise to pay in that case referred to the guardian, the decision isn't put upon that narrow ground. "A guardian," says the court, "unless his powers in this respect are restricted by statute, is authorized by virtue of his office and without any order of court to sell his ward's personal property and reinvest the proceeds, and to collect or compromise and release debts due to the ward, subject to the liability to be called to account in the proper court if he has acted without due regard to the ward's interest." The transaction was held to be neither a compromise nor a sale, but the collection of a debt which the guardian had the right to make in the absence of statute to the contrary: Maclay v Equitable, etc., Society, 152 U. S. 499.

C. P. of Lackawanna Co.

Mahon v. Mahon

Judgment—Opening—Collateral agreement

The defendant in a judgment entered by confession in his promissory note has no standing to attack it on the ground that it was voluntary and without consideration, inasmuch as only the defendant's creditors are prejudiced in law by such voluntary confession.

Motion to open judgment.

W. M. Bunnell, for Plaintiff.
O'Brien & Kelly, for Defendant.

November 13, 1916. NEWCOMB, J.—The effort is, (1), to avoid the obligation of the note on the ground that it was purely voluntary and without consideration; and,

(2), to set aside the judgment as entered in violation of plaintiff's collateral promise, not in writing.

But the effort fails for several reasons: First, no one but defendant's creditors are prejudiced in law by his voluntary confession of judgment, and he himself has no standing to attack it on that ground; second, the alleged promise not to put the confession in judgment rests upon defendant's uncorroborated assertion, controverted by distinct denial on the other side; third, his account of the transaction involves a material variance in that he shows by his own testimony hat he gave the note to secure a loan then obtained from the sister together with various other loans and advances which she had heretofore made to him and on his account, the aggregate of which he was very hazy about, but according to her testimony was fully equal to the face of the note. There is no other witness in the case. The motion is therefore without merit either in law or fact and the rule to show cause is discharged.

ORPHANS' COURT

O. C. of Schuylkill Co.

Carroll's Estate

Burial Expenses of Minor's Mother.

There is no Act of Assembly which authorizes the Orphans' Court to make an order in the estate of a minor to pay out of such estate the expenses of interment of the minor's mother.

Petition for an order to pay burial expenses of minor's mother.

James A. Dolphin for petition.

February 26, 1917. WILHELM, P. J.—This is the petition of Thomas P. Ryan, guardian of Leo Carroll, a minor thirteen years of age, and who has an estate amounting to Eight Hundred Dollars, praying for an order directing him to pay the expenses of interment of Annastasia Carroll, the deceased mother of said minor, amounting to One Hundred and Eighty Dollars.

The petition further sets out that Thomas Carroll, the father of said minor, was divorced from Annastasia Carroll by decree entered in Common Pleas Court of Philadelphia County in the year 1906.

It is impossible to determine the Act of Assembly relied upon for this proceeding. If it is under the Act of June 13, 1886, P. L. 547, which provides that the father and grandfather, and the mother and grandmother, and the children and grandchildren, of every poor person not able to work, shall, at their own charge, being of sufficient ability, relieve and maintain such poor person, at such rate as the Court of Quarter Sessions of the County where such poor person resides shall order and direct," it is of no avail, because that Act provides that before the order can be made, the court shall find that the party is of sufficient ability to relieve and maintain such poor person. It may be further noted that the Act of 1836 confines the proceeding to the Court of Quarter Sessions, and does not give the Orphans' Court any power to hear or determine this proceeding.

If the Act of June 25, 1895, Section 1 P. L. 369, is invoked, the position of the petitioner is not strengthened, because that Act confines the proceeding to the Court of Quarter Sessions, and gives no jurisdiction to the Orphans' Court. The last mentioned Act requires the Quarter Sessions Court before making an order of this character, that the defendant shall be found to be a person of sufficient ability to pay such sum as the court shall think reasonable and proper.

No Act of Assembly has been pointed out to the court, which would permit the making of the order prayed for. The Act of March 29, 1832, Section 13, P. L. 192, allows the Orphans' Court in the case of an infant child being without adequate provision for its support and education to direct a suitable periodical allowance out of the miner's estate for the support and education of such minor, according to the circumstances of each case, and this is the only Act of Assembly giving the Orphans' Court authority to make allowance out of the estate of a minor.

This minor is thirteen years of age. The income from this estate is not large, and surely not more than sufficient to support it? If this order should be made the principal of the estate would be seriously depleted, and the minor may become a pauper.

The petition does not assert, although Thomas Carrol was divorced from his wife, Annastasia Carroll, the mother of the minor, that he is not legally bound to pay the expenses of interment. Neither does it state to whom this amount is due, and the nature and character of the charges.

The petition is dismissed.

York Legal Record

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COMMON PLEAS

Bank of Glen Rock v. Sheffer et. al.

Equity—Collusive Remedy—Jurisdiction.

Plaintiff's bill alleged a collusive convevance of B's property to C., for the purpose of defrauding B's creditors, and praying for a cancellation of the deeds, an injunction against conveying or encumbering the property and other relief. C demurred because plaintiff's claim had not been reduced to judgment and because there was a remedy at law. HELD, that the demurrer must be dismissed.

Defendant B being a non-resident, no personal action could be successfully prosecuted against him in this jurisdiction and a proceeding *in rem* would be so inconvenient and slow as to make it an inadequate remedy as compared with a bill in equity.

The equity court is itself the judge of whether the legal remedy is an adequate one, and where such action is circuitous and burdensome, and in any way uncertain, it will not prevent the court of equity from taking jurisdiction of the case.

A. C. Wiest for demurrer.

Niles & Neff and *S. D. Warehein*, contra.

Demurrer to plaintiff's bill.

May 21, 1917. WANNER, P. J.—The First National Bank of Glen Rock, the plaintiff, alleges in its bill that the defendant, Benjamin F. Sheffer, on the 4th day of October, 1915, and for a long time prior thereto, was indebted to it on three promissory notes for $494.40, $475.00 and $415.00 respectively, which notes were accepted by said Bank upon the credit and security of certain real estate situate in York County, Pa., which, at the time of the making of said notes, belonged to the defendant, Benjamin F. Sheffer.

That subsequent to the making of said notes, to wit, on the 4th day of October, 1915, the defendant, Benjamin F. Sheffer, and Amanda Sheffer, his wife, executed deeds for said real estate in the State of Florida, where they then resided, and delivered the same to Isaac Sheffer and Lydia Ann Sheffer, the grantees, who then were, and still are residents of the County of York, Pennsylvania.

The plaintiff alleges the said deeds were collusively and fraudulently delivered by the grantors to the grantees therein, for the purpose of cheating and defrauding the plaintiff, and in order to place said property beyond the reach of legal process and execution to enforce payment of said notes held by the defendant against said Benjamin F. Sheffer. It is also alleged in the bill that said deeds were given without good and lawful consideration, and that they were not recorded in County of York by the grantees therein, until after the plaintiff had renewed the above mentioned notes of Benjamin F. Sheffer without any knowledge of the sale of said real estate.

The prayer of the bill is that said deeds be declared void and a decree be made for their cancellation, and that defendants be enjoined from conveying or encumbering said real estate, and for such other and further relief as the plaintiff may be entitled under the circumstances.

The defendants, Isaac Sheffer and Lydia Sheffer, have filed separate demurrers to said bill questioning the jurisdiction of the Court and denying the right of the plaintiff to the relief prayed for (1) Because it has not reduced its claims against Benjamin F. Sheffer to judgment. (2) Because it has an adequate remedy at law, by obtaining judgments against the defendant, Benjamin F. Sheffer in a foreign attachment, and buying his title under an execution and subsequently testing the same in an action of ejectment.

The allegations of the plaintiff's bill specifically allege that the sale of this real estate by Benjamin F. Sheffer to Isaac Sheffer and Lydia Ann Sheffer, was collusive and fraudulent in its purpose, and with knowledge of the indebtedness of said Benjamin F. Sheffer to the plaintiff, and that recording of the deeds for said property was withheld by the grantees until after the plaintiff had renewed the notes and extended the credit of said Benjamin F. Sheffer on the faith of his supposed ownership of said real estate.

This brings the case directly within the well settled equitable jurisdiction of this court on the ground of fraud and collusion, and interference with the rights and remedies prescribed by law for the enforcement of the plaintiff's claims. Such jurisdiction is also given by the Acts of June 13, 1840, P. L. 671, and February 14, 1857, P. L. 39. It is held that in cases of that kind, courts of equity acquire concurrent jurisdiction with the courts of law; Mortland v. Mortland, 151 Pa. 593; Clauer v. Clauer, 22 Pa. Super. Ct. 395; Read & Co. v. Real Est. &c.

Co., 156 Pa. 181; Wagner v. Fehr, 211 Pa. 435-8; Curtis Co. v. Olds, 250 Pa. 324; Orr v. Peters, 197 Pa. 606.

It is well settled, too, that the plaintiff's legal remedy must be fully efficient and adequate under the circumstances, to defeat the defendants alleged fraud, and to secure the plaintiff's rights, if it is to stay the interposition of the equity courts.

The equity court is itself, to a large extent, the judge of whether or not the remedy suggested in the court of law is a fully adequate one, and where such legal action is circuitous and burdensome and in any way uncertain, it will not prevent the court of equity from taking jurisdiction of the case.

The promptness and convenience of the equitable remedy, as against any uncertainty, delay or difficulty in the available legal process, is always to be considered by the Court; Fuller v. Fisk, 43 Pa. Super. Ct. 489-492.

In this case, the defendant, Benjamin F. Sheffer, is a non-resident of this Commonwealth and no personal action could, therefore, be successfully prosecuted against him in this jurisdiction. The only remedy at law suggested as an adequate one in this case, is a foreign attachment, which is a preceeding in rem, in which a judgment might be obtained in this Commonwealth, and the title to these premises be finally tried in a subsequent action of ejectment.

This, however, is manifestly a circuitous and difficult proceeding involving several actions whose inconvenience and delay make it inadequate as compared with the prompt and efficient equitable remedy which is available to the plaintiff in this proceeding.

If the defendant, Benjamin F. Sheffer, lived within this jurisdiction so that the plaintiff might get a judgment, and sell the defendant's title on an execution in the ordinary way, it might present an adequate remedy and the necessity of an equitable proceeding would not be so apparent.

Equity avoids a multiplicity of actions by disposing in one proceeding of all the questions affecting the various parties involved in the case; Corbe v. Burkhart, 33 Pa. Super. Ct. 317-320.

The authorities cited to us for refusing equity jurisdiction to this creditor do not rule this case, because in those proceedings the creditors had already reduced their claims to judgments and there was nothing to prevent their issuing execution and testing the title in the usual way in an action at law.

The demurrer is overruled,

C. P. of Lackawanna Co.

Pennsylvania Central Brewing Co. v Anthracite Beer Co.

Injunction—Trade-Mark—Unfair competition—Similarity of markings on beer kegs.

The use by a brewer of certain markings of his beer kegs in unnecessary and exact imitation of the markings used by a rival brewer for many years before the imitator came into the field, will be enjoined.

As relating to the necessary daily recovery of empty beer kegs for re-filling, peculiar to the brewery business, the defendant's act must be regarded as mischievous, and tending to cause confusion of property, and to increase both the hazard of mistake in collection and the expense of handling in that branch of the service, and on that ground the complainant is entitled to relief in equity.

Proof of actual deception is not essential. Plaintiff's right to relief by injunction is the liability of injury to his trade by means of deception.

There is no rational ground of distinction, in respect to the need of relief, between an injury which operates to impose additional cost of service on another, and one which directly tends to take away his trade.

Exceptions by defendant to decree *nisi*.

Warren, Knapp, O'Malley & Hill and *M. J. Martin* for Plaintiff.

D. J. Reedy, R. W. Archbald and *J. D. Jordan* for Defendant.

January 2, 1917. NEWCOMB, J.—The exceptions are numerous but those only need be considered which go to the pivotal question whether in any view of the facts a case is made out either of trade-mark or unfair competition; and specific discussion would, therefore, serve no useful purpose. It is neither disputed nor disputable that the facts disclose a case of unnecessary and exact simulation by one brewer of the marking exclusively used on its packages by a rival brewery for many years before the imitator came into the field, which on its face is repugnant to one's instintive sense of fair competition. The attempt to say it has not been so exclusively used by plaintiff is vain. The semblance in case of any other rival has only been partial, and thus the packages of the various brewers have heretofore been easily distinguishable and not calculated to deceive. So, too, it is believed to be no answer to say that no mere colors or combination thereof can be adopted as a trade-mark. Unless the doctrine of the cases has been misunderstood, the authorities relied upon by the learned counsel for that criticism are not applicable here. This is not an instance of mere stripes in differ-

ent colors. The marking must be regarded in its entirety and includes, (1), stripes; (2), colored chimes; and (3), circle to match, around the name of the brewery, on each head. This device could have no possible significance except by reason of its association with the particular product so marked for more than one generation, thus indicating indentity of origin, manufacture and ownership. "Every person is at liberty to affix to a product of his own manufacture any symbol or device, not previously appropriated, which will distinguish it from articles of the same general nature manufactured or sold by others. * * * The object of the trade-mark is to indicate either by its own meaning or by association the origin or ownership of the article to which it is applied"; Mfg. Co. v. Trainer, 101 U. S. 51. The general principle is well stated in the text of the Encyclopedia: "Devices or symbols are the most usual forms of trade-mark. Any device or symbol may be protected as a trade-mark which is arbitrary in its character and selection, and does not by its inherent character necessarily describe the goods upon which it is employed, nor contain any misrepresentation of the fact with reference to the goods, their origin, character, qualities or contents. Trade-marks of this class usually consist of devices or symbols in combination with words or names": 28 A. & E. Enc. L. (2d Ed.) 361. Thus a plain triangle inclosed by an oval with the words "Bass & Co.'s Pale Ale" is held to be a valid trade-mark; In Re. Worthington, 14 Ch. Div. 8; also a mixture of colors in the selvage edge of worsted goods; Mitchell v. Henry, 15 Ib. 181; a red cross for absorbent cotton; Johnson v. Brunor, 107 Fed. Rep. 466; and a label on beer bottles consisting chiefly of a striking diagonal band in red; Brewing Ass'n v. Clarke, 26 Fed. Rep. 410.

But, it is urged, the brewer's trade is peculiar; it is carried on with regular customers to whom deliveries are regularly made; and therefore it cannot be interfered with by any imitation of the color device on the rival's packages.

Why then go to the trouble of exact simulation? Why simulate the marking of the leading competitor? Why so insistent upon retaining the imitation despite plaintiff's offer to bear the expense of re-marking?

Taking defendant at the word of its managers, the only reason is that to now give up the imitation would ruin their own business because their customers would accuse them of being "bought off," a reproach that had already been intimated in that quarter. Bought off from what? What advantage either actual or potential is to be lost in that way, if none was to be gained by the imitation? What interest can its customers have in the maintenance of the imitation unless it is calculated to advance their trade? How could it serve that end unless its lends itself to a deception of the ultimate consumer?

"Now it has been said more than once in this case, that the manufacturer ought not to be held liable for the fraud of the ultimate seller; that is, the shop-keeper or the shop-keeper's assistant. But that is not the true view of the case. The question I have to try is whether the defendants have not knowingly put into the hands of the retail dealers the means of deceiving the ultimate purchaser"; per Chitty, J., in Lever v. Goodwin, 36 Ch. Div. 1. The same has been held in our own Federal Courts; For example, in Lead Co. v. Cary, 25 Fed. Rep. 125, where it was said by Judge Gresham: "The complainant is entitled to relief if the brand used by defendants sufficiently resembles complainant's brand to be mistaken for it, and the defendants adopted their brand for the purpose of selling their kegs as the kegs of complainant, or for the purpose of enabling retail dealers to do so, and the complainant has been injured by this fraud or is likely to be injured by it.

Proof of actual deception is not required. The test of plaintiff's right to relief by injunction is the liability of injury to his trade by means of deception; Vulcan v. Myers, 139 N. Y. 364.

But that the nature of the business is peculiar, is true enough, and it compels some recognition. It can be carried on only by means of the daily recovery of the empty packages for re-filling. That the act complained of is mischievous and tends to the confusion of property at that stage is self-evident and not seriously disputed, so that if there were nothing else in the case, the hazard of mistake in collection and the expense of handling in that branch of the service must be increased.

To this it is answered that at best it would be mere *damnum absque injuria* as it has to do only with handling the empty packages after the sale of the contents has been completed, and therefore cannot be regarded as tending to steal plaintiff's trade.

The argument is based upon the theory that the public can have no concern with the empty packages; that its deception alone is material; and that in this particular no one could be misled excepting the plaintiff or its servants.

Technically the argument may be good; but as applied here it can have nothing else in its favor. That is to say, confusion of property arises from the lawless or capricious act of a rival. Having regard to the conditions under which plaintiff must serve its trade, the injury is quite as palpable and vexatious so far as it operates to interfere with and increase the cost of the service, as where it directly tends to take away the trade. In respect to the need of relief, there is no rational ground of distinction between the two. Hence, one can appreciate the broad statement of the principle as deduced from many cases by the editors of the Encyclopedia: "A dealer coming into a field already occupied by a rival of established reputation must do nothing which will unnecessarily create or increase confusion between his goods or business and the goods or business of his rival. Owing to the nature of the goods dealt in or the common use of terms which are *publici juris*, some confusion may be inevitable. But anything done which unnecessarily increases this confusion and damage to the estabished trader constitutes unfair competition. * * * Any artifice, device or peculiarity of arrangement adopted by the defendant which tends to increase the probability of deception and which is not necessary for any useful or proper purpose, will be enjoined"; 28 A. & E. Enc. L. (2d Ed.) 422.

Whether looked at as a case of technical trade-mark or as one of unfair competition, the merits are wholly with the plaintiff.

The exceptions are dismissed.

C. P. of Berks Co.

Reifsnyder et al. v. Reifsnyder et al.

Partition—Act 17 April 1864, P. L. 641—Allowance of Fee for Plaintiffs' Counsel.

Under the Act 27 April 1864, P. L. 641, the Court of Common Pleas may, under peculiar circumstances attending a proceeding in equity for partition, allow plaintiffs' counsel a fee of $1,000 for services rendered for the common benefit of all the litigants.

Exceptions by defendant to Master's Report.

P. D. Wanner and *S. E. Bertolet* for exceptant.

Henry Maltzberger, *Sherman H. Hoverter* and *Cyrus G. Derr* for plaintiff.

November 25, 1916. ENDLICH, P. J.—This is a proceeding in equity for partition, in which the property has been sold by the Master for $17,000 and plaintiffs' three counsel ask to have a fee of $1,000 taxed as costs payable out of the fund thus raised. By agreement of the counsel on both sides the question of the propriety of this demand was passed upon by the Master. He allowed it and defendants excepted to his decision. Possibly it was not within the scope of his functions to determine this matter. The statute seems to refer it to the Court; Act 27 Apr. 1894, P. L. 641. But that question is not now important. If necessary we can treat the plaintiffs' counsel's demand as before us *de novo*. With a view to judging of its admissibility both the judges have subjected this record to careful consideration. Giving full effect to the cases cited in support of the exceptions; Grubb's App., 82 Pa. 23; Fidel'y Ins. Co.'s App., 108 id. 339; B. & S. Ass'n v. Bank, 142 id. 121, we are both of the opinion that the peculiar circumstances of this litigation make the allowance asked grantable without offending against the rule laid down in those decisions. The proceeding, begun in 1909, has been one of long duration and unusual complications, owing to the number of the parties on both sides, the intervention of death and lunacy, the nature and subdivision of the interests represented, the various steps successively required, the accounting involved, etc. It is perhaps a significant fact that there are over 50 docket entries in the course of the proceeding up to this date. Practically all that was done by counsel on both sides was for the common benefit of all concerned—a circumstance recognized in the fact, stated at the argument, that, by mutual agreement, the fee of defendants' counsel was charged against and made payable out of the fund. If that was proper it is difficult to see why plaintiffs' counsel's fee should not be similarly treated. The propriety of its amount as compensatory, and no more, of the services rendered, is not in controversy. We conclude that we ought to decide this matter in favor of the demand made. As this case, being *sui generis*, is not ruled by any precedent, so it cannot become a precedent in future proceedings lacking its extraordinary features.

The exceptions are dismissed.

Dillon v. Glatfelter et ux

Parent and Child—Custody.

Petitioner abandoned his wife and children in 1906. In 1912 his wife obtained a divorce and supported herself and children until her death in 1914. The child was subsequently, by the church of which she was a member, placed in the custody of the respondents, who clothed, fed and schooled her. The petitioner, having remarried, asked that the child be remanded to him as her natural protector. HELD, that the petition must be refused.

In questions of this nature the Court will investigate the circumstances and act according to a sound discretion, the primary object being the good of the child.

The relator has not shown that he deserves her custody, having abandoned her in her infancy, and never displaying any practical solicitude for her physical, moral or spiritual welfare, until he began this proceeding.

Under the circumstances of the case, and in view of the protests of the child herself, now in her fifteenth year, it would be cruel to place her in the custody of the relator.

Petition for Writ of Habeas Corpus.

No. 64, October Term, 1916.

Robert C. Fluhrer for relator.

H. A. Gross for respondents.

June 4, 1917. Ross, J.—This proceeding was commenced by the petition of the relator, William D. Dillon, to obtain the custody and control of his daughter Marie Dillon, whom, he alleged, was placed with the respondents Noah Glatfelter and Annie Glatfelter, his wife, without his consent or knowledge; that he had made numerous demands for the return of the said child to his home but the said Glatfelter and wife refused to return the said child and continued to keep her in their said custody and possession against the express wish and desire of the petitioner who (he alleged) is the lawful and rightful custodian of the said Marie.

At the hearing the following facts were developed:

Marie Dillon is the legitimate daughter of the petitioner, and was born September 5th, 1902. She lived with her father, the petitioner, and her mother, together with a brother and sister until sometime in April, 1906. On the 5th of August, 1912, a divorce *a vinculo matrimonii* was granted by this Court to Lydia Dillon from the petitioner, William D. Dillon. The divorce was granted, as shown by the proceedings therefor, because of the wilful and malicious desertion of the said William D. Dillon. The undenied and uncontradicted evidence of Mrs. Mary Morgan, Lewis Haack, Mrs. A. W. Bastrass and Mrs. Amanda Foyle, taken at the hearing on the application for divorce, and placed in evidence without objection in this hearing, was to the effect that for several years prior thereto the said Lydia Dillon worked hard and supported her three children. After the divorce was granted by this Court, Lydia Dillon took her daughter Marie Dillon, supported and cared for her until sometime in 1914, when she died, leaving Marie to the care of a stepfather, who evidently abandoned her. The members of the Westminster Presbyterian Church of the City of York, (of which church Marie was a member) learning of her abandoned condition, procured a home for her with the respondents, Noah Glatfelter and his wife Annie Glatfelter, who have clothed, fed, schooled and cared for her ever since October 2nd, 1914. Marie Dillon was examined in open court and separately by me. She evinced an unusual advancement in the studies taught by our common school system, which evidenced the fact that her schooling and education had not been neglected.

Her demeanor was gentle, quiet and comparatively refined. Her pronunciation was more than ordinarily correct and her voice was well modulated and refined. These things are strong indications that the child's moral surroundings had been refining rather than degrading.

In the interview with the Court, she was very frank and candid and she impressed me as being very sensitive, and more thoughtful and sad than most young girls of her age. She evidenced a deep sense of devotion to religious teachings and beliefs and while she expressed a very intelligent conception of her filial duty, she most earnestly implored the Court not to order her into the custody of her father for whom she evidenced considerable antipathy and fear. The arguments which she used in urging the Court not to place her in the custody and control of her father were remarkable for the abundance of common sense and logic for one of her age and surroundings. She had

somehow obtained the impression that she was one year older than the church records showed her to be; and, indeed, one might readily be induced by her manner and talk, to believe that she is much older in years than the records show her to be.

The law is that, "When a court is asked to appoint a guardian of the person of a child, it will investigate the circumstances and act according to a sound discretion, the primary object being the good of the child." Heineman's Appeal, 96 Pa. 112; Commonwealth v. Atticks, 5 Binn. 519; Commonwealth ex rel. v. Hartigan, 19 Dist. 961; Commonwealth ex rel. v. Strickland, 27 Pa. Sup. 309; Commonwealth ex rel. v. McDonald, 20 Dist. 1071; Fahs v. Berkstresser, 24 Y. L. R. 184; Miller v. Mitchel, 30 Y. L. R. 36.

The conditions surrounding the subject of this case, as revealed by the evidence, call for the most careful exercise of the judgment of the Court. The unusual intelligence and innate refinement of the child in question, causes my mind to wonder why some of our numerous philanthropic societies ever permitted her to be so neglected as the evidence depicted her to have been before she was placed in the care of the respondents. They seem to be her benefactors since she was abandoned by her stepfather after her mother's death.

The relator, her father, now seeks her custody, but he has not shown that he deserves it, for he has not shown by the evidence that he ever had any natural solicitude or affection for her; the evidence conclusively shows that he abandoned her in her infancy and never displayed any practical solicitude for her physical, moral, or mental welfare until he began this proceeding. The most direct and logical inference which can now be drawn from his actions, is, that he seeks to obtain possession of her for the purpose of having her assist his recently acquired wife in household duties. He says he will send her to school, but does not say what school. My own knowledge of the schools of the neighborhood in which he now resides leads to the conclusion that they are in no wise better fitted to improve her intellectual condition than the school which she now attends near Glen Rock, in this County. He says that he wants her because he has a natural and legal right to have her; but does not the evidence clearly disclose the fact that he has long since forfeited those rights through neglect and indifference, which practically resulted in her abandonment? It is true that he is fortified now in his endeavor to obtain the custody of his daughter by a most estimable and praiseworthy society of religious philanthropy; but does not the evidence show that his neglect, and indifference for his child, has resulted in her having espoused the faith of another religious denomination, in the tenets of which she seems to be well entrenched both by intellect and faith? Has he not by neglect allowed her to obtain and harbor feelings of antipathy and fear for him?

When his past life of neglect of this child is compared with his present demeanor, it cannot result otherwise than in the conclusion that his present action is prompted more by a desire to obtain the physical assistance of his daughter, than by any intention or desire to better her condition in life. There is no evidence before the Court which would warrant it in concluding that the welfare of Marie Dillon would now be enhanced by placing her in the custody of the relator. Indeed, as against the protests of Marie, we think it would be an act of cruely to do so.

After a full hearing of all the evidence in the case and after a careful consideration of the arguments had before the Court, we are of the opinion that the petition should be dismissed, and for the present we remand Marie Dillon to the custody, care and protection of the respondents Noah Glatfelter and his wife Annie Glatfelter, until the further order of the Court.

C. P. of Lackawanna Co.

Weiland v. Weiland

Actions—Form of—Alteration of record.

The question whether a bond accompanying a mortgage, after being filed in the prothonotary's office and before entry of the usual notation on the continuance dock, had been altered by the addition of certain words restricting the lien of the judgment to the specific lands bound by the accompanying mortgage, is one of fact for a jury, and cannot be determined by the court on motion to correct the record.

Motion to correct record.

W. L. Schanz and *John P. Kelly* for motion.

R. W. Rymer, contra.

April 30, 1917. NEWCOMB, J.—The record would stand some correction aside from that asked for by petitioner. She is the executrix, etc., of Theodore H. Weiland, deceased, and has been so ever since his death in 1913. The record in question is a judgment d. s. b. founded on a security held by deceased in his lifetime and which came to the hands of his executrix by virtue of her trust. The propriety of making her the plaintiff when judgment was entered thereon in January, 1916, ought to have occured to the mind of counsel who directed the entry. The "estate of A. B." is not a proper party to a judgment recovered by his personal representative on the common law side of the court.

The authority for entering it is a general warrant of attorney in defendant's bond of February, 1912. It was directed, not in the ostensible execution of that power, but by mere praecipe of "plaintiff's attorney." This, however, may be regarded as a defect in form rather than substance. But judgment was taken, as directed, for the penal sum of the bond, $14,000, with interest from its date. This is erroneous in that the interest is payable only on the real debt of $7,000. These are pointed out as careless methods not to be commended and for which there is no good excuse, as they would be avoided by ordinary attention to the instrument itself.

The thing complained of by petitioner is an alleged alteration of the bond by the addition of a few words which would restrict the lien of the judgment to the specific lands bound by the accompanying mortgage. The bond itself has disappeared from the files, but the restriction appears in the continuance docket entry. For technical reasons the prothonotary is made a party to the present motion, but neither he nor any of his office force is charged with being at fault in the premises. The change is alleged to have been made during the short time which elasped between the filing of the bond by attorney and the usual notation on the continuance docket. Petitioner's case rests upon the theory that the bond was stealthily taken from the office by someone and in like manner replaced, after the alleged alteration had been made, with such expedition that its temporary absence passed unnoticed, and thus the fact was not discovered by petitioner's counsel until oecasion to refer to the record occurred some four months later.

The allegation is just as stoutly denied on the one side as asserted on the other. Thus a dispute arises which is purely one of fact and as such ought to be tried by a jury.

An issue is accordingly awarded for that purpose; as to the form of which the parties by their counsel will be further heard.

The disposition of the present rule will await the result of such issue.

C. P. of Lehigh Co.

Finance and Guaranty Company v. West Auburn Creamery Co.

Foreign Corporations—Doing Business Within State—Art. 16, Sec. 5, of Constitution—Act of April 22, 1874, P. L. 108.

The purchase, by a foreign corporation not registered in this State, of book accounts covering a number of transactions with different parties, the collection of which extended over a period of several months, more or less permanent and in line of its corporate activities, the corporation at all times exercising complete control over the transactions within the State through its designated agents within the State to carry on these corporate activities, is doing business within this State and is in violation of Article 16, section 5, of the Constitution of Pennsylvania and the Act of April 22, 1874, P. L. 108.

Motion to take off Non-Suit.

Sam'l J. Kistler and *Chas. F. DaCosta*, for motion.

George W. Aubrey, contra.

March 19, 1917. GROMAN, P. J.—The plaintiff, a foreign corporation with its principal office at Baltimore, Maryland, on December 13, 1913, entered into an agreement with the defendant, West Auburn Creamery Company, a domestic corporation, with its place of business at Allentown, Pennsylvania, whereby the defendant company sold, assigned and set over to the

plaintiff company, its successors and assigns, all its right, title and interest to and in a number of open accounts and contracts fully set forth in said agreement. Under the terms of the agreement collections were to be made, and paid over to the plaintiff; the West Auburn Creamery Company, the defendant, and V. G. Tice of Allentown, Pennsylvania, were designated as agents to do so. The plaintiff avers that the defendant is indebted to it in the sum of $557.53 for failure to comply with certain terms of the agreement; suit was brought to recover said amount. It is admitted that the plaintiff corporation was not registered in the State of Pennsylvania, and at the trial the case was submitted as to whether plaintiff was doing business in Pennsylvania as a foreign corporation in violation of the Act of April 22, 1874.

Article XVI, Section 5 of the Constitution of Pennsylvania provides that "no foreign corporation shall do business in this state without having one or more known places of business and an authorized agent or agents in the same, upon whom processes may be served." The Act of April 22, 1874, was passed to make the constitutional provision effectual, and remained in force until the Act of June 8, 1911, was passed designating the Secretary of the Commonwealth as agent for all foreign corporations. The question whether or not the company is doing business within the State of Pennsylvania is one of fact not necessarily dependent solely on single acts or on the effect of single acts, but on the effect of all combined acts which they are performing here: Commonwealth v. Wilkes-Barre and Hazleton Railroad Company, 251 Pa. St., p. 10. A single act may or may not constitute "doing business;" Thompson on Corporations, 6670 et seq. It has also been held that where a foreign corporation appointed a local agent in this state to whom it consigned goods to be sold on commission, the company employed a portion of its capital within the Commonwealth, that its property shipped here was liable to be sold or returned as it might determine, that then it was doing business in this Commonwealth; The Milsom Rendering and Fertilizer Company v. Kelly, 10 Pa. Sup. Ct., p. 565. In Osborne v. Shilling, 11 American and English Annotated Cases, p. 322, it was held that a foreign corporation maintaining an agency in another state was doing business therein, so also, is the ownership of goods in another state, on the ground that the consignee becomes the agent for the company.

It thus seems that the tests to be applied are: did the corporation act within the scope of its corporate powers; was part of its capital invested in the state for a more or less indeterminate period; was it a single transaction only, or did it contemplate a series of acts extending over a period of time; did the corporation have an agent or agents in the state representing it for the purpose of carrying on the business in which it was engaged?

That plaintiff acted within the scope of its corporate powers is conceded, and cannot be the subject of argument. That plaintiff invested part of its capital in Pennsylvania can be found by the facts as disclosed by the pleadings. The purchase of book accounts covering a number of transactions with different parties, the collection of which extended over the period of several months, was more or less permanent and was in the line of its corporate activities; the plaintiff at all times exercising complete control over the transaction within the state through its designated and appointed agents within the state to carry on its corporate activities in the state after acquiring certain accounts by purchase. The act of the agent coming into the state and soliciting business for the foreign corporation is not here in question; what we are now concerned in is the situation of the plaintiff after the execution of the agreement, and the acts of plaintiff in carrying out the terms of the agreement, indicating whether it was "doing business in the state" or not. The plaintiff transacted at least a part of the business within the state, had part of its capital invested, and had personal property therein subject to legal process. In Thompson on Corporations (White's Supplement 1915), 6671-6672, we find the following language: "A foreign corporation is 'doing business' within a particular state when it transacts therein some substantial part of its ordinary business which is continuous in character, as distinguished from merely casual or occasional transactions."

We, therefore, reach the conclusion that plaintiff corporation was "doing business" in the state which required it to register therein.

Motion to take off non-suit overruled.

C. P. of Lancaster Co.

Vickers v. Conestoga Traction Co.

Damages—Negligence—Intoxication—Duty of railway employees—Evidence—Preponderance of.

A plaintiff whose suit is grounded on alleged negligence must not only establish the negligence by a preponderance of evidence but show that it was the cause of the injury and the negligence proven must be that alleged in the statement and no other.

A plaintiff can not recover damages for an injury to which his intoxication contributed, to the extent that he would not have been injured if sober.

There is no speccial duty on the part of a traction company to maintain a lookout for intoxicated persons, and it discharges its duty when its employees, after discovering them on or near the track. exercise reasonable care to avoid injuring them.

A preponderance of evidence does not mean the greater number of witnesses but the greater credibility of the evidence on the one side, and although the jury may believe the story of one witness, against several, the testimony of one witness uncorroborated, particularly if interested, should be considered with great care, and ordinarily, where contradicted by a number of witnesses, some of whom appear to be disinterested, and no good reason appears for disbelieving them, the jury should not arbitrarily disregard that preponderance.

Rule for a new trial.

C. E. Montgomery for rule.

S. R. Zimmerman and *John E. Malone*, contra.

January 13, 1917. LANDIS, P. J.—In this case, the question involved was purely one of fact, and as such it was submitted to she jury. The trouble that now arises for the plaintiff is not so much the alleged error on the part of the Court as that the finding of the jury was in favor of the defendant. All of the ten reasons assigned are to the charge of the Court and the answers to the defendant's points, and at least some of them have no bearing upon the real point raised therein.

The circumstances surrounding the accident, as claimed by the plaintiff, can be briefly told. On September 25, 1915, the plaintiff, who was a carpenter, living in Lancaster City, was working as a laborer or mortarman at Quarryville, in this county. After his work was done, he, about nine o'clock p. m., left that place on a car of the defendant company for his home. Not paying to the conductor his full fare to Lancaster, but only ten cents, he was told to leave the car at Refton Station. In his examination-in-chief, he testified that, when the car reached Refton, the conductor "got hold of me and he put me off." On cross-examination, he said he got off at Refton on the platform side. However, it is of little consequence, so far as this case goes, whether he got off or was put off, and nothing that the Court said or omitted to say on this subject can in the least affect the result. In fact, none of this evidence should have been introduced, and it would not have been admitted if objection had been raised. Sufficient for this case is it that he was off the car at Refton, and that he had alighted from it in perfect safety. What happened thereafter is the important part. After a time, and while he was standing at or near the Refton Station, a car came along, going towards Quarryville. It has been testified that it was the same car that had brought the plaintiff to Refton, as that car ran to Beaver Valley Junction, and then, as was its custom, returned to Quarryville. When this car came along, the plaintiff says he was four or five feet away from the track, and that he signaled with his left hand to the motorman in charge. According to his story, the car came to a full stop, and, while it was standing still, he put his left foot on the step and grasped with his hands the handle bars on each side; that then the car gave a quick jerk and threw him violently against the hind end where he had his hold with his left hand, and then he flew the opposite way, the lengthway of the car, forward and sideways, and he kind of threw his right hand out, and his hand got under the car or was injured by the car. This was the ground upon which the plaintiff claimed to recover, for his statement reads that, "while said plaintiff was in the act of mounting the steps and getting on the rear end of the car, at a time when the car had come to a full stop, said company, defendant, did unlawfully, negligently, carelessly and improvidently start and move said car more or less violentiy and in a very sudden manner, before plaintiff had safely gotten thereon, or had been afforded a reasonable time to get safely thereon, or had been safely received as a passenger, * * * whereby he was seriously and permanently injured," and added that the plaintiff was "hurled violently

to the ground, with his right arm under the car." This, then, being the cause of the injury as alleged in the statement, the plaintiff was bound to convince the jury of its truth, before he could recover at all. Now, why should there be a quibble as to whether the car went over his hand in whole or in part? It surely caused the accident, and that, as was said to the jury, every one admitted. If it did not, why was the plaintiff before the Court, charging the defendant company with negligence?

In Brickwood Sackett's Instructions, Vol. 3, pl. 3740, it is stated that the jury shall not consider the question of damages until they have determined: " * * Second, whether the defendant was guilty of the negligence charged in the declaration;" and in Black's Law and Practice in Accident Cases, sec. 222, that "there cannot be a recovery upon a ground of negligence not alleged." In Kepner v. Harrisburg Traction Company, 183 Pa. 24, Mr. Justice McCollum said: "The general rule is, that the plaintiff, whose suit is grounded upon the alleged negligence of the defendant, must not only establish the negligence by competent evidence, but he must show that it was the cause of the injury for which he sues." It has also been decided that the statement in an action for negligence must set forth with particularity the defendant's acts on which negligence is predicated and the cause and nature of the inquiry; mere general averments of negligence are not sufficient. Now, what were the instructions of the Court to the jury as to his right to recover? After a full statement of the plaintiff's version of the manner in which the injury occurred, the Court said: "Only if the jury find that the car stopped and the plaintiff was on the step, attempting to enter, and that the conductor signaled and the car started violently and threw him off and his arm got under the hind wheel of the car and was mangled, can there be a verdict in favor of the plaintiff. That is the cause which the plaintiff sets forth in his statement as having caused his injury, and he can recover for this and nothing else. If the accident was caused in any other way than is asserted by him in his statement, the verdict must be in favor of the defendant." And again: "The jury must, as we have said and we again repeat, find that he was attempting to get upon a car which was standing still when he made the attempt and which he had a right to enter, and that he must have been thrown from the car by the sudden starting and jolting of the car and thus injured, and if they so find, and only then, they may render a verdict in his favor. When I say a car which he had a right to enter, it is not disputed, of course, that he had a right to stop that car and get on it on that night, if that is what he was doing." We are of the opinion that this is a fair statement of the law upon this subject, and if it is not, we shall be glad to be set right.

The statements of the evidence, which are complained of in the third, fourth and fifth reasons, will, on reference to the Notes of Testimony, be found to be fully sustained. The testimony of John E. McFalls in relation thereto is contained on page 61; that of Harry E. Donahue on pages 68, 69 and 70; and that of Amos H. Shaub and John P. Gerhart on pages 78 and 80. But, even if inaccuracies of statement were made in some degree, it nevertheless remains that the principal issue involved in this case was fully and fairly submitted to the jury.

The affirmance of the defendant's first, second and third points is in accord with the authorities. The first point reads: "If the jury believe that Joseph M. Vickers, the plaintiff, at the time of the accident, was intoxicated, and would not have been injured if he had been sober, and that the motorman did everything in his power to stop the car to prevent the accident, then the verdict of the jury must be for the defendant;" and the second point: "If the jury believe that the plaintiff, at the time of the accident, was intoxicated and was sitting west of the Refton Station thirty-five or forty feet, close to a pole, and near the tracks of the defendant company, and pitched forward in front of the car because of his intoxicated condition, and thus caused the injury to his right hand, then the verdict of the jury must be for he defendant." In Wynn v. Allard, 5 W. & S. 524, it is held that "a plaintiff in an action of trespass is not entitled to recover damages for an injury done to him which was the consequence of his own negligence as well as that of the defendant," and in Black's Law and Practice in Accident Cases, sec. 344, it is said that "intoxication on the part of the injured person does not *per se* establish contributory negligence, but it is a circumstance that may be considered as bearing upon the question of plaintiff's due care. Intoxication is not a defense, unless it was the proximate cause of the injury, because a drunken man is not

beyond the protection of the law: * * * but, if plaintiff's intoxication contributed to the injury, he cannot recover, because the plaintiff's intoxication is no excuse for his own negligence." In Wharton on the Law of Negligence, pl. 332, it is laid down that, "where the injury is a consequence flowing in the usual course of events from the plaintiff's misconduct, then the plaintiff cannot recover. Thus, an intoxicated person, or a person driving recklessly, cannot recover for an injury caused by a collision with an object negligently on the road, because, in the usual course of events, a person who is drunk, or drives recklessly, precipitates himself against whatever is in his way, and as something in any ordinary drive will be in his way, the question of the defendant's negligence is immaterial." In Hershey v. Road Commissioners of Mill Creek Township, 9 Atlantic Reporter 452, the Court below charged that: "If the parties were on a debauch, and find from the evidence that, but for the drunkenness of Briggs, the accident would not have happened, then, notwithstanding the neglect of the town authorities, the plaintiff will not be entitled to recover in this case." On appeal to the Supreme Court of this state, this ruling was affirmed. Again, in Munley v. Hull, 3 Lackawanna Jurist 277, Archbald, P. J., held that "intoxication is evidence that should go to the jury on the subject of negligence, and, if found to be the cause of the accident, the plaintiff cannot recover."

The proposition as contained in the third point seems to me to be a correct statement of the law. That point reads: "The rule of law is, that there is no special duty on the part of a traction company to maintain a lookout with a view of promoting the safety of intoxicated persons, but that the railway company discharges its duty when its employees, after discovering them lying upon the track, or near it, in front of their advancing car, exercise reasonable care to avert injury to them." It certainly is not presumed that the employees having the cars in charge will find intoxicated persons along the track, and, therefore, the company must maintain a lookout to promote the safety of such persons. It is undoubtedly true that, if, in the course of the employment, and while performing the duty required of him, an employee shall see such persons on or along the track, he cannot ruthlessly run them down. He must exercise reasonable care to avert injury, the same as in all other cases. The burden of proof is on the plaintiff to prove negligence, and the mere fact of injury will not in general raise such presumption. It is the duty of the driver to watch, and to have his car under as complete control as the necessary motion of it will permit, and his attention should be directed steadily to the track ahead of him to observe its condition and any danger that may threaten either his car or the public; Reilly v. Phila. Traction Co., 176 Pa. 335. It must be, however, remembered that the plaintiff does not contend that he was injured in this way, for, according to his statement, he was attempting to enter a car that was at a full stop, but which was suddenly started, thereby causing the accident. The point as stated was really only a theoretical proposition, legally correct, but one which neither helped nor hurt either of the parties, and it might well have been omitted.

The answer to the fourth point was rather in the interest of the plaintiff than the contrary. It sets forth that the plaintiff was bound to show by a preponderance of evidence, that the injury to him occurred by him being thrown from the car by the sudden jolting of the same, and in no other way. As this was the cause assigned in the statement, the law of the point was manifestly correct, and it was, therefore, affirmed. But it will be remembered that the plaintiff was the only witness who testified on his part concerning the manner in which the injury was brought about, and, thinking that the jury might misunderstand what was meant by a preponderance of the evidence, the Court proceeded to explain it. It was said that a preponderance of the testimony did not mean the greater number of witnesses called on any one side, as a jury might believe one witness and disbelieve a number of contradicting witnesses, if they were convinced that the one witness, from his manner of testifying, the opportunities which surrounded him and the general facts appearing in the case, had told the correct story. But we then added the caution contained in Cromley v. Penn'a R. R., 211 Pa. 429, that the testimony of one witness, uncorroborated, particularly if interested, should be considered with great care, and under all ordinary circumstances, where one interested witness, unsupported, is contradicted by a number of witnesses, some of whom appear disinterested, and no good reason appears for disbelieving them, the preponderance of the testimony inclines to

that side, and the jury should not arbitrarily disregard that preponderance of the testimony. Mr. Justice Fell, in that case, said: "Only one witness testified that there had been a stop; five witnesses, who had a better opportunity to see what happened, testified that there had been no stop. If there was nothing in the manner of defendant's witnesses to throw doubt on their testimony, the preponderance of the testimony should have led the jury to find for the defendant, and on their failure so to find, the Court should have granted a new trial." See, also, Anderson v. Pittsburgh Railways Co., 251 Pa. 517.

An examination of the testimony will, we think, conclusively show that the plaintiff was intoxicated and thus brought about his injury. The jury, after carefully considering the evidence, so viewed the case, and properly found for the defendant. The rule for a new trial is therefore, discharged.

Rule discharged.

C. P. of Northampton Co.

Fluck v. Heller

Trespass for Deceit—Sufficiency of Statement—Practice Act, May 14, 1915, P. L. 486.

A statement in an action of trespass for deceit is insufficient where it shows that the plaintiff received a deed for certain lands described in courses and distances, and the averment of fraud consists in the allegation that the "defendant, or his agents" represented that a contiguous tract was included in the premises sold. The statement should set forth the names of the agents, and also that the defendant had knowledge that the agents had made the false statements before the deed was delivered.

Under the "Practice Act, 1915" an opportunity to amend the statement may be given.

Trespass to recover damages for deceit.

Smith, Paff & Lamb and *Russell N. Koplin* for plaintiff.

James T. Woodring for defendant.

January 1, 1917. STEWART, P. J.—This is a question of law raised by the defendant in his affidavit of defense as to the sufficiency of the statement of claim under section 20 of the "Practice Act, 1915," P. L. 486. Plaintiff claims that his statement is founded upon Martachowski v. Orawitz, 14 Pa. Super Ct. 175. That case, however, is not at all similar to the present case, and while Judge Porter did say "the statement on demurrer must have been adjudged sufficient," yet it does not appear from the report of the case that the sufficiency of the statement was ever questioned. Nor is the present case like Griswold v. Gebbi et al., 126 Pa. St. 353. That case was a very close one, and Mr. Justice Mitchell said that the liability of the defendant for the acts of her agent was not involved in the decision. Referring to that subject, he said: "But the question does not really arise, as there was testimony not only that the defendant knew of the preparation of the circular by her agent, but also that she had herself given it to parties who inquired about the property." Again, the same judge, in Freyer v. McCord, 165 Pa. St. 539, referring to the case, said: "Griswold v. Gebbie was said to be a very close case, but attention was called in the opinion to the fact that the defendant not only knew of the preparation of the deceptive circular by her agent, but had herself given it to some parties who inquired about the property. That element is entirely wanting in the present case. There is no evidence that either the defendant, or Graham, her agent to prepare the deed, knew of any fraud, if in fact any fraud was committed." When we turn to the statement in the present case, we find that the defendant was the owner of the tracts described in paragraph one, and we find that by paragraph twelve those tracts were conveyed by deed to the plaintiff and described by courses and distances. The allegations of the plaintiff, without quoting fully, are as follows: "the defendant, through his agents," represented that the contiguous tract described in paragraph second, also belonged to the defendant; "that in pursuance of the solicitations of the defendant, or his agents, the agents of the defendant" showed certain land to the plaintiff; "that the defendant or his agents unlawfully, fraudulently and deceitfully did represent and state to the plaintiff, with intent to deceive the plaintiff, that the defendant was the owner of all the real estate," &c.; that the defendant was not the owner of the real estate, &c.; that the fact that the "defendant did not own part of the land was well known to the defendant, or his agents"; "that the defendant, or his agents, made such unlawful, fraudulent and deceitful representations to the plaintiff with the intent that they should be acted upon by the plaintiff." All the averments, with the exception of the one in paragraph fifth, are in

the disjunctive; that is to say, "the defendant, or his agents." Nowhere is the name of the agent given. The foundation of this action is moral turpitude on the part of the defendant. That must be averred and proved before the plaintiff can recover. If the transaction was by the defendant and his agents, it should be so stated. If the false representations were made by the agent, knowledge that they were so made, and that the defendant knew that they were false at the time the agent made them, must be brought home to the defendant. The plaintiff must have known just what land he received. His deed must have told him that. If the agents represented that the Boyer tract belonged to Heller, before the plaintiff can recover he must aver in his statement, and prove on the trial, that Heller knew that the agents had made the false representations before he gave the deed. This is the plain doctrine of Freyer v. McCord, 165 Pa. St. 539: and Keefe et ux. v. Sholl, 181 Pa. St. 90. The plaintiff must know the names of the agents, what they said, and when they said it, and must also know whether Heller had knowledge of their statements. If he cannot truthfully aver these facts, he ought not to put the defendant to the trouble and expense of going to trial, because he could not recover. It would not be right to enter judgment for the defendant without giving the plaintiff an opportunity to amend, if he can.

If the plaintiff shall amend his statement within fifteen days from this date, in conformity with the views above set forth, the defendant shall file his affidavit of defense to the averments of fact in said statement within fifteen days after service of the amended statement upon him. If the plaintiff shall fail to file his amended statement within the time set forth, upon motion of the defendant, the prothonotary shall enter judgment for the defendant and against the plaintiff.

C. P. of Lancaster Co.

Sorrick v. Scheetz

Tort—Statement—Sufficiency of—Act of May 14, 1915, P. L. 483.

Under the Practice Act of May 14, 1915, a statement is not defective in that it does not set forth the contract on which the plaintiff depends and whether it is oral or written, where the action is founded on a tort and the material facts are set forth in concise form.

Rule to strike off statement.

Harnish & Harnish for rule.

B. F. Davis, contra.

January 13, 1917. HASSLER, J.—This is a rule to strike off a statement filed under the Act of May 14, 1915, P. L. 483. The Act requires that the statement shall set forth the material facts, upon which a plaintiff relies to recover, in a concise form and that it shall state whether the contract on which the plaintiff depends is oral or in writing. In this case, however, it does not appear that the plaintiff depends upon an express contract. The statement sets forth that he was the owner of eight pigeons, which he left in the possession of the defendant when he ceased to be employed by him. He subsequently directed the defendant to ship them to him, and on defendant's failure to do it, he, or by his agents or attorneys for him, demanded the return of the pigeons, which the defendant failed to make. He further alleges that defendant has converted and disposed of said pigeons to his own use.

The act of the defendant in converting and disposing of the pigeons which are the property of the plaintiff, though in his, the defendant's possession, to his own use, is a tort. The plaintiff can, however, waive the tort and sue in assumpsit for money had and received; Finney v. McMahon, 1 Yeates 248; Dundas v. Muhlenberg's Executors, 35 Pa. 351; Zell v. Dunkle, 156 Pa. 353; Barley v. Beegle, 29 Sup. 635; O'Neill v. Brown, 17 D. R. 1062.

Under these circumstances the statement is not defective in that it does not set forth the contract and allege whether it was oral or written, as the material facts upon which the plaintiff relies to recover are set forth in a concise form. The fact that he brought them to defendant's place of business through an arrangement need not have been set forth in the statement, but it is not defective be-

cause he stated more than he was actually required to do.

There is no merit in the contention that the statement does not set forth the items of his loss. As a matter of fact, it does do this in setting forth the number of the pigeons and the value of each. We think the statement complies with all the requirements of the act of assembly, and discharge the rule to show cause why it should not be stricken off.

Anderson v. Anderson

Divorce—Counsel Fees.

The respondent denied the facts set forth in the libel, and asked for an allowance for counsel fees and expenses. Subsequently libellant asked leave to withdraw the suit. The facts showed that the husband had been ordered by the court of another county to pay respondent a weekly allowance; and that he had begun proceedings in divorce in still another county. HELD, that the petition for allowance must be granted.

The meandering of the libellant in his effort to shift jurisdiction not having been explained, justice requires that he shall pay the expenses in this court and those incurred by his wife in following him from another couuty so that she might vindicate herself from the charges he has placed on record against her.

Rule to show cause why counsel fees and necessary expenses should not be allowed respondent.

Rule to show cause why libellant should not be permitted to withdraw his action for divorce.

Logan & Logan and *Fred. C. Miller* for respondent.

K. W. Altland for libellant.

June 25, 1917. Ross, J.—Harry B. Anderson filed his libel in divorce, and obtained an award of subpoena from this Court against his wife, Annie Anderson.

On the third day of April, 1916, the subpoena was made returnable to the first Monday of June, 1916.

On the 24th of April, 1916, the respondent appeared by counsel, who presented her petition, which set forth, among other things, that she had entered her appearance by attorney in response to the service on her of the subpoena in divorce.

"That she has neither the means nor the income to carry on the aforesaid proceedings in divorce."

"That the said libellant is under the order of the Court of Dauphin County for maintenance for three dollars per week."

"That the facts alleged in the libel are not true."

The prayer of the petition is for the Court to make an order directing the said libellant to pay her a reasonable sum for the necessary expenses, costs and counsel fees for conducting said proceedings in divorce.

On the same day a rule was granted on the libellant, to show cause. The rule was made returnable to the eighth day of May, 1916.

On the 8th day of May, 1916, the libellant filed an answer to the last named rule by which he asserts his inability to pay the expenses and counsel fees petitioned for by the respondent.

On the 19th day of February, 1917, Harry B. Anderson filed a petition in this court, setting forth, "that he is the libellant in the above stated case." * * * * * "Your petitioner and libellant desires to withdraw and discontinue his said suit for divorce," and "asks for leave to withdraw and discontinue said suit for divorce upon the payment of costs in the said divorce case."

The petition was ordered to be filed and a rule was granted directed to the respondent to show cause, returnable the first Monday of March, 1917.

On February 26, 1917, the respondent filed her answer to the rule.

Subsequently, testimony under the several rules granted, was regularly taken and read as depositions to the court at the time argument was made for and against the several rules.

By the records and the depositions, the following facts are established.

After the libellant and respondent had been legally married they lived together as husband and wife for over five years, when, for some reason unknown to the Court, they separated and the wife went to reside in or about Harrisburg, Dauphin County, Pennsylvania, where she brought an action, in the Court of Dauphin County, against her husband, for her maintenance.

That Court made an order on the husband to pay for the support of his wife, the

sum of three dollars per week and that order is now in effect.

Subsequently, the husband began his action against his said wife for divorce in this court.

The wife promptly filed her petition for expenses and counsel fees, alleging her inability to pay for the defence which she alleges she has to that action of her husband.

Subsequently and before those controversies had been disposed of by the Court the husband filed another libel in divorce from his said wife, in the Court of Cumberland County, Pennsylvania.

It is evident from the depositions that the husband has some property and income; and is much better equipped to earn money than his wife is.

This Court has no light on the merits of the libellant's suit to obtain his divorce. The substance of the respondent's undenied answers and depositions which were filed in support of her contention must, as a matter of fact be taken as true. The meandering of the libellant in his effort to shift jurisdiction, has not been explained. The facts, and his lack of candor, have impelled this Court to conclude that justice requires that he be ordered to pay the expenses of his action in this court which caused his wife to follow him from Dauphin County so that she might vindicate herself from the charges which he has placed upon the records of this Court against her, if she can. She has been compelled, by his actions, to employ counsel to secure her rights in this County and to make trips from Harrisburg, Dauphin County, (where she has successfully invoked the aid of the Court as against her husband) to York, and, from the evidence, will be compelled to still further follow his action in Cumberland County.

The decree of the Court is that Harry B. Anderson, the libellant, pay to Annie Anderson, the respondent, the sum of fifty dollars as counsel fees for services rendered in this case, and twenty dollars for her individual expenses. When that has been done to the satisfaction of the Prothonotary, and all other record costs have been paid, the suit in divorce may be withdrawn and discontinued as prayed for and the rules granted shall be disposed of in accordance with this decree.

QUARTER SESSIONS

Q. S. of Schuylkill Co.

Com. v. Andruchek

Grand Jury—Re-submission of Bill.

The return of ignoramus made on indictment by a Grand Jury should be the end of the prosecution originating in the information returned by the committing magistrate. If public interests require further action it should be by a new warrant on a new information except where the District Attorney is justified in preferring an indictment.

Grand Jurors constitute a part of the Court and if their returns are in proper form and there is no evidence of misconduct or irregularity attending their acts and where there is no allegation or proof that a bill was ignored in consequence of oversight, mistake or fr&ud, or where no grave emergency or urgent public need requires it a bill should not be recommitted to a Grand Jury nor a new one committed to a subsequent Grand Jury.

Petition for Re-submission of Bill.

April 2, 1917. KOCH, J.—An indictment was submitted to the grand jury sitting for the March Term, 1917 but was ignored. The prosecutor thereupon presented his petition, stating that he had appeared and testified before the grand jury concerning the charge above stated and that he was corroborated in his statements by two witnesses. Attached to the petition of the prosecutor are the separate affidavits of his two witnesses stating briefly their knowledge of the incriminatory features of the case and that they had testified to the same before the grand jury. The petitioner prayed for a resubmission of the bill of indictment. The reasons for resubmitting the same bill of indictment or sending a new indictment before the grand jury must be stronger than those stated in the present application. Nothing appears before us that would warrant the proceeding. The Supreme Court said, in Rowand v. Commonwealth, 82 Pa. 407, "On principle, the return of "ignoramus" made on an indictment by a grand jury should be the end of the prosecution, originating in the information returned by the committing magistrate. The defendant has complied with the condition of his recognizance. The prosecution has failed with the failure of the bill. The sureties of the defendant are released and he is entitled to be discharged. In analogy to the rules by which other judicial proceedings are governed, this should be the end of the case, founded on the complaint he was called on, in the first instance, to answer. If the public interests should require that further

action should be taken against him, it should be by a new warrant on a new information, except in those rare cases (which should be defined as accurately as possible), in which the District Attorney is justified in preferring an indictment without a preliminary hearing. Such a rule would not interfere with the power of the judges of the Quarter Sessions, on proper notice, to recommit to the same or a succeeding grand jury a bill thrown out in consequence of oversight, mistake or fraud."

In Commonwealth v. Whitaker, 25 County Court Reports 42, Criswell, P. J. in refusing a motion for resubmission said, "Grand jurors, for some purposes and to a certain extent, constitute a part of the court. As such they act under oath, being sworn 'well and diligently to inquire and true presentment make.' Having been instructed as to their duties, under the obligation of their oaths, they sit and deliberate privately, and if their returns to the court be in proper form and there be no evidence of misconduct or irregularity on their part, the presumption of good faith, good conduct and regularity which attends the acts, findings and conclusions of all having like deliberative and discretionary powers, should obtain. The fact that they sit and deliberate privately renders it impossible for the court to control, direct and review their proceedings as they may those which are had in their presence. And the fact that from time immemorial they have so sat and deliberated may be taken as conclusive of the fact that it is not and never was intended that the court should so direct, control and review their proceedings."

In Commonwealth v. Priestly, 24 County Court Reports 543, President Judge Lindsey, in a well considered opinion, refused and declined a motion to send an indictment to another grand jury where there were no allegations of irregularity, oversight, mistake or fraud. And the late Judge Weidman, when a member of this court in Commonwealth v. Allen, 14 County Court Reports 546, held the same view, to the effect, that, where there is no allegation or proof that the bill was ignored in consequence of oversight, mistake or fraud, or where no grave emergency or urgent public need requires it, a bill should not be recommitted to a grand jury or a new one committed to a subsequent grand jury.

Whether or not a true bill is made out by the evidence is alone for the grand jury to say and not the Court. It requires only twelve votes of the grand jury to find a true bill and the work of the grand jury will not be reviewed except in cases of irregularity, mistake or fraud.

There is no allegation in the petition that would warrant the prayer thereof.

The petition is refused.

Com. v. Rodgers

Costs—Imposition on Prosecutor.

Defendant was acquitted of the larceny of a newspaper, and one-half of the whole costs placed on the prosecutor. HELD, that that portion of the verdict must be set aside.

The fact that a single newspaper may be of very small money value, was no sufficient ground upon which to ignore the true nature of the act of taking it or impose any part of the costs on the publishers.

The prosecutor having had good grounds for its prosecution should not have been made liable for any portion of the costs.

Motion to set aside so much of the verdict as imposed part of the costs on the prosecutor.

S. C. Frey for motion.

June 18, 1917. WANNER, P. J.—In this case the jury very unjustly imposed one-half of the whole costs on The Dispatch Publishing Company, the prosecutor. The evidence showed very clearly the taking of a copy of the York Daily by the defendant from the place where it had been left for delivery to a subscriber, and the actual fact of the taking was not denied by the defendant, though he made a statement intended to palliate his guilt in so doing.

The fact that a single newspaper may be of very small money value, was no sufficien ground upon which to ignore the true nature of the act of taking it or impose any part of the costs of the prosecution upon The Dispatch Publishing Company. Its entire issue and its entire business is based upon the delivery of single newspapers to its individual subscribers. The loss to this subscriber was but one of many instances which in the aggregate have a very material effect both upon the company and upon the public. We saw nothing in the evidence which justified the imposition of costs upon The Dispatch Publishing Company. It had good grounds for its prosecution and should not have been made liable for any portion of the costs. As the court has the power to prevent any injustice by setting aside that portion of the verdict of the jury, it becomes our duty to do so."

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COMMON PLEAS

Shreiner v. Codorus and Manheim M. P. Insurance Company. No. 2

Fire Insurance—False Answers—Particularity.

Plaintiff brought suit on a policy of insurance, averring loss by fire. The affidavit of defense alleged false answers in the application to the questions as to whether the property insured was encumbered, and as to whether the defendant had ever suffered a loss by fire before. HELD, that a motion for judgment for want of a sufficient affidavit of defense must be refused.

An affidavit of defense which is as specific as the plaintiff's statement, is sufficient to prevent summary judgment.

No. 123, August Tern, 1915.

Motion for judgment for want of a sufficient affidavit of defense.

The statement in this case is found in Shreiner v. Codorus and Manheim M. P. Co., 30 YORK LEGAL RECORD 106.

The substance of the affidavit of defense is found in the Court's opinion in this case.

The reasons of the motion for judgment for want of a sufficient affidavit of defense are as follows:

1. The affidavit of defense is made and sworn to by W. H. Brodbeck, Secretary of said Defendant Company and does not state that said Defendant Company, "has a just, true, full and legal defense to all or part of plaintiff's claim."

2. There is no averment in said affidavit, that Defendant expects to be able to prove the facts set out in said affidavit.

3. The averment in said affidavit that Plaintiff is guilty of fraud and false swearing in making up his proof of loss, does not show how or in what manner said fraud was perpetrated upon Defendant.

4. That said affidavit avers that the various sums claimed by the Plaintiff are grossly excessive, but does not state sufficient facts upon which to base a claim of how the defendant Company arrives at such a conclusion.

5. The affidavit of defense is vague, the averments general in their character, and generally insufficient to prevent judgment.

6. The affidavit avers that the proof of loss furnished by said Plaintiff was rejected by said Defendant, without stating in what particular the proofs were objectionable, nor does said affidavit aver that any suggestion was made to Plaintiff wherein said proofs of loss were not in accordance with the terms of the Policy.

C. W. A. Rochow for motion.

Stewart & Gerber, contra.

June 25, 1917. ROSS, J.—This case has been before the court on the defendant's demurrer to plaintiff's statement to claim. After argument the demurrer was refused and the defendant was ordered to plead over within fifteen days from the date of that ruling; 30 YORK LEGAL RECORD 106.

The case is now before the court on the plaintiff's motion for judgment for want of sufficient affidavit of defense. Since the adoption of the practice under the Act of May 25th, 1887, P. L. 271, judgment may be taken for want of an affidavit of defense, or of a sufficient affidavit of defense; L. S. Herb et al v. Littaning Ins. Co., 138 Pa. 174.

"While the construction of an affidavit of defense should be in favor of plaintiff and against the party making it, a defendant is under no duty to deny a liability not fairly arising from the statement;" Barker v. Fairchild et al., 158 Pa. 246.

In the present case the plaintiff's statement "claims of the defendant" * * * "the sum of one thousand nine hundred and forty dollars, with interest from the 30th day of November, 1914, according to a certain policy of insurance, in writing, executed and delivered to the plaintiff by defendant, on or about the latter part of January or beginning of February, 1914.

"A copy of the policy (as averred by the statement) is annexed to the statement and made a part thereof, as "Exhibit A."

The statement also avers (among other things) "That on the 23rd day of September, 1914, at Warrington Township, the premises in said policy of insurance mentioned were destroyed by fire" * * * "on September 23rd, 1914, at the Borough of Dillsburg, said County of York, Pa., the plaintiff gave notice to the defendant of the fire and loss, and on or about September 30th, 1914, at the City of York, York County, Pa., did deliver to the defendant a particular account of the plaintiff's loss and damage, and also of the value of the premises insured, and when and how the fire originated to the best of the plaintiff's

knowledge and annexed to said notice was a certificate under the hand and seal of a justice of the peace, of Jonathan Cassel, who lived most contiguous to the property destroyed by fire, stating that he was acquainted with the character and circumstances of the insured, and without fraud, he, the plaintiff, had sustained a loss or damage upon the premises insured to the sum of one thousand, nine hundred and forty dollars, yet the defendant has not paid to the plaintiff the said sum of money by it insured" * * * "nor repaid or reimbursed him for the loss sustained by the said fire or any part thereof" * * * "contrary to the form and effect of the policy of insurance."

A reference to the copy of the policy annexed to the statement as "Exhibit A," discloses that the policy "does insure" * * * "against all direct loss or damage by fire and lightning, except as hereinafter provided, to an amount not exceeding two thousand, nine hundred and thirty-five dollars on the following property while located and contained as described herein, and not elsewhere, to wit:

"$450.00 on his two-story frame, shingle roofed dwelling, and additions thereto adjoining and communicating.

"$300.00 on his household and kitchen furniture, useful and ornamental, family wearing apparel and materials for same, provisions, printed and bound books, music, watches, jewelry in use, silver and plated ware, china, glass, queens and crockeryware, pictures, paintings, engravings and mirrors (with their frames at not exceeding cost), travelling apparatus, musical and scientific instruments, statuary, ornaments, sewing machines, sporting outfits, fuel and family stores and all articles generally used in housekeeping, the property of the assured or any member of the family. All while contained in the above described building.

"$1100.00 on his frame bank barn and additions thereto.

"$200.00 on his frame grain and hay shed or stable.

"$75.00 on his frame hog stable and corn crib.

"$140.00 on his farm machinery and implements and pleasure vehicles while on premises.

"$250.00 on his produce, consisting principally of hay, grain, straw and other products of a farm, while on premises.

"$50.00 on his horse gears and harness, while on premises.

"$250.00 on his horses, not exceeding $125.00 for any one animal.

"$120.00 on his live stock, not exceeding $40.00 for any one animal.

"All situate in Warrington Township, York County, Pa.

"Standard lightning clause attached.

"Attached to and forming part of policy No. 26972 of the Codorus and Manheim Mutual Protection Insurance Company of York, Pa."

The written application of plaintiff for insurance, which is printed on the back of the policy, among other things, includes the following questions and answers: "17. Is the property hereby insured incumbered by mortgage, judgment or any other lien, and if so, to what amount?" "No."

"14. Have you ever suffered loss of property by fire? If so, were you insured and in what company?" "No."

The affidavit of defense specifically denies the truth of those answers, and avers that, at the time the plaintiff answered the said interrogations there were two judgments entered as liens against the property of the said J. H. W. Shreiner insured by the said policy as follows: Peter Warner, No. 659, January Term, 1912, entered March 29, 1912, for $250. One of Jacob M. Gotshall, No. 394 August Term, 1911, entered October 13, 1911, for $400.

It also avers that the answer made to the 14th interrogatory was not true, for the reason that the said J. H. W. Shreiner had a fire loss in the month of May, 1914, by the burning of his stable on North Market Street, in the town of Mechanicsburg, Cumberland County, Pa. Those averments are specific, and if properly proven will require an explanation which cannot be derived from the plaintiff's statement.

"On the hearing of a rule for judgment for want of a sufficient affidavit of defense the court may not go outside of the case as presented by the claim and affidavit, to consider extraneous facts, either in support of or against the line of defense disclosed;" Allegheny City v. Charlotte McCaffrey, 131 Pa. 137; Beruhardt v. Taylor, 223 Pa. 307.

It will be observed that the suit is brought to recover for loss by fire, on a policy which specifically designates the amounts placed on clearly specified property, as $450.00 on his

two-story frame shingle roof dwelling and additions."

"$300.00 on his household and kitchen furniture," &c.

"$1100.00 on his frame bank barn and additions thereto."

"$00.00 on his grain and hay shed or stable."

Specific amounts are placed on each of six other plainly described items.

The statement claims an aggregate sum and there is nothing on the record, or legally before the court which would enable it to determine whether all, or if not all, which of the items insured had been destroyed or damaged.

If the affidavit of defense would only deny the truth or accuracy of the aggregate amount claimed in the statement in as general a way as the claim is made, it would be such a direct answer to the claim as would require plaintiff to prove his claim.

In the case of Giordano v. St. Paul F. & M. Ins. Co., 63 Pa. Sup. Ct. 236, Mr. Justice Trexler, speaking for the Superior Court said, "The plaintiff in his statement sets forth his loss in a lump figure. The defendant in his defense uses the same method. We see no reason why the defendant should be held to a greater particularily than the plaintiff; Wiland v. Royal Ins. Co., 61 Pa. Superior Ct. 409."

For these reasons, the affidavit of defense in this case, in our opinion, is sufficient to prevent summary judgment.

Motion for judgment for want of a sufficient affidavit of defense is refused.

C. P. of Allegheny Co.

Green v. Supreme Lodge Knights and Ladies of Honor

Insurance — Beneficiary — Constitution and By-Laws—Waiving Provisions Thereof.

Judgment will be entered for plaintiff in an action by a beneficiary under a beneficiary insurance policy where the defense was that plaintiff did not belong to any of the classes designated as possible beneficiaries under the constitution and by-laws of the association, and it appeared that all premiums had been paid regularly and decedent was in good standing at the time of death, and there was no evidence to show that plaintiff was not the beneficiary named on the books of the lodge.

There is no rule or law that prevents a beneficial insurance association from waiving any of the provisions of its constitution or by-laws, if it sees fit so to do.

Motion for judgment *non obstante veredicto.*

Jennings & Jennings for plaintiff.

Mehard, Scully & Mehard for defendant.

March 19, 1917. HAYMAKER, J.—The plaintiff, at the conclusion of the trial, put a point for binding instructions, in her favor; and the defendant asked for like instructions in its favor. We affirmed plaintiff's point and directed a verdict for her.

The plaintiff seeks to recover the amount of a benefit certificate issued by the defendant to one Catharine Sarsfield, on the ground that she became the beneficiary on the death of the insured. The defendant contends that it not only refused to accept or recognize plaintiff as a beneficiary, but that she could not have become such under either the law, or the constitution or by-laws of the order. The defendant is a beneficial association incorporated under the laws of the State of Indiana, and authorized to do business in the State of Pennsylvania.

On and prior to September 24, 1903, a subordinate lodge of defendant was located in the Borough of Braddock, in this county, known as Fort Liberty Lodge, No. 606, of which Mrs. Sarsfield became a member, and on that date the defendant issued to her its beneficial certificate, in which her husband, Joseph Sarsfield, was named as the beneficiary entitled to receive $1,000 on the death of the insured. The husband died in the year 1910. On the death of her husband Mrs. Sarsfield was quite old and without any living relative, or means of support. When her husband died she was taken to the home of the plaintiff, where she was maintained and cared for until her death on April 30, 1914. The plaintiff was neither a relative of nor a dependent on the insured, Mrs. Sarsfield, and for those reasons the defendant contends that there can be no recovery in this case, while the plaintiff contends that the plaintiff waived these objections and recognized the plaintiff as the beneficiary under that certificate. It cannot be disputed that Mrs Sarsfield desired, and made every effort to have the plaintiff designated as the beneficiary, and the question is: Did she succeed legally under the undisputed facts in this case? We think she did. On her husband's death she found herself a feeble old woman, without means or relatives, but in the possession of a benefit certificate on which she had paid assessments to the defendant for six or seven years, and in

which she was in good standing. In the spring of 1911 she applied to Mr. Gaeb, the recording secretary of the subordinate lodge, to have the plaintiff designated as the beneficiary of her policy, and he sent the necessary paper, the policy and the necessary fee of fifty cents to the Supreme Lodge for that purpose, but they were returned to her with the information that such change could not be made. A careful reading of the testimony of practically all the witnesses in relation to that attempt to have the plaintiff named as beneficiary, together with the refusal of the Order, and notice to Mrs. Sarsfield, with her statements at the time of the rejection, will show that they were speaking of an effort that was made in the spring of 1911. On the 13th of December, 1911, Mrs. Sarsfield made the second effort to have the plaintiff named as her beneficiary, and in doing so she executed and swore to a paper called a "Dependent Beneficiary Affidavit," called "Exhibit 2," in which was set forth the name and number of her lodge, the fact that she desired to change her beneficiary, the name of the plaintiff as the new beneficiary, that she was dependent on the proposed beneficiary, that they were not related, and that the relation between them was fixed by contract and not dependency. At the same time she made an affidavit that she had no living relative, and both papers were sent through Mr. Callahan, a Notary Public, to Mr. Connel, the Supreme Secretary in the State of Indiana. That application, "Exhibit 2," was later returned to her with the stamp of the Supreme Secretary thereon, showing that it had been received by him, but without any objection or comment. From that time until the death of Mrs. Sarsfield, on April 30, 1914, the plaintiff regularly paid, in advance, all assessments that accrued on the certificate to the local lodge with the knowledge of the officers thereof that they were paid by her. The plaintiff made remittances by post office money orders, to the financial secretary of the local lodge, accompanied by a receipt book or card, and thereafter the book or card was returned in an envelope addressed to the plaintiff. There was no denial on the part of the financial secretary that the remittances were regularly made by the plaintiff to him, and that the receipts therefor were returned to her. On April 30th, 1914, the day on which the insured died, the plaintiff paid to defendant the sum of $2.65, being the assessment due for April, 1914, which the defendant thereafter retained, and still retains. As we have said, Mrs. Sarsfield forwarded to the Supreme Lodge in the fall of 1911, her application and affidavit for the substitution of the plaintiff as her beneficiary, to which the defendant thereafter made no formal objection, and thereafter that beneficiary regularly paid in advance all assessments that accrued to the defendant on the policy or certificate. The defendant offered no denial of payment, nor did it offer to show that the plaintiff was not in fact made the beneficiary on the books of the lodge, but contents itself by saying that under the constitution and by-laws of the organization such substitution was legally impossible. Our attention has been called to no Act of the Legislature of either Indiana or this State prohibiting the designation of such beneficiary, and as the statutes of this State would govern the case no such prohibition exists in our Act of April 6, 1893, P. L. 7, invalidating the contract made by the defendant with the insured under the facts in this case; Shumega v. First Catholic Slovak Union of the United States of America, 61 Sup. Ct. 126. The defendant, however, contends that under he relief fund laws of the order (Law 4, Designation of Beneficiaries, Secs. 1 and 2) the benefit cannot be made payable to the plaintiff, but must be limited to one or other of the two classes enumerated, neither of which applies to this plaintiff. Even if those provisions do exclude the plaintiff, there is no rule or law that prevents the association from waiving any of the provisions of its constitution or by-laws, if it sees fit so to do; Beil v. Sup. Lodge Knights of Honor, 80 App. Div. (N. Y.) 609; Fanning v. The Sup. Council of C. M. B. Assn., 84 App. Div. (N. Y.) 205; Lamont v. Hotelmen's Mut. Ben. Assn., 30 Fed. Rep. 817; Coverdale et al. v. The Royal Arcanum, 193 Ill. 91; Delaney v. Delaney, 175 Ill. 187; The Bloomington Mut. Ben. Assn. v. Blue, 120 Ill. 121; Schoen et al. v. Grand L. A. O. U. Workmen et al., 85 Minn. 349; St. Louis P. R. Assn. v. Strode et al., 103 Mo. 694; Grand A. O. of U. W. of St. of Mo. v. Reneau et al., 75 Mo., 402; Kepler v. Sup. Lodge Knights of Honor, 52 N. Y. Sup. Ct. Rep. 274; Gray v. Nat. Ben. Assn., 111 Ind. 531, and Gould v. Dwelling House Ins. Co., 134 Pa. 570. The defendant knew that the insured had no known living relative, or any one dependent on her; that when it was accept-

ing the assessments on her certificate there was no one to whom the amount of the certificate could be paid under its constitution and by-laws, if not to the plaintiff, and yet it saw fit to receive those assessments from the plaintiff regularly down to and including the day of the death of the insured. We see no reason for entering judgment for the defendant *n. o. v.*, and judgment is now entered for the plaintiff.

C. P. of Lehigh Co

Troxell v. Troxell

Divorce—Libel—Causes for Divorce.

Divorce is of statutory origin, and the libel should contain the language of the statute.

In an action by a wife for divorce, an allegation of personal indignities is insufficient without the allegation that these forced the libellant to withdraw from respondent's house and family.

April 2, 1917. GROMAN, P. J.—The Act of March 13, 1815, provides two distinct causes of divorce as follows: "When any husband shall have, by cruel and barbarous treatment, endangered his wife's life," or "offered such indignities to her person, as to render her condition intollerable and life burthensome, and thereby forced her to withdraw from his house and family." The libel sets forth the following cause: "By cruel and barbarous treatment and indignities to her person rendered her condition intolerable and life burdensome." Divorce is of statutory origin and the libel should contain the language of the statute; Sites v. Sites, 23 Pa. C. C. 439. The libel fails to allege that the indignities offered to her person forced her to withdraw from respondent's house and family. The libel is thus defective and alleges no ground for divorce provided for by the Act; where a libel is defective, it is the duty of the Court to refuse a decree: Dunkel v. Dunkel, 11 Pa. C. C., 297. The following authorities throw additional light on the averments to be contained in libels for divorce as this court views the question involved: Edwards v. Edwards, 9 Philadelphia 617; Spengler v. Spengler, 15 W. N. C. 437; Schlichter v. Schlichter, 10 Philadelphia 11.

Decree in divorce refused.

C. P. of Lancaster Co.

Miller v. Pequea Township School District

Contract with teachers—Mark of teachers—Salary—Discretion of directors.

A board of school directors agreed to pay to a teacher as his salary "$50. to $55. (1, $50, 1, $55) per mark per month." The County Superintendent in his report gave the teacher a No. 1 mark but the directors reduced his mark to 1— and refused to pay him more than $50 a month. On suit for $5 a month more, HELD, that the directors had authority to make such a contract but the mark designated in the contract was the mark of the Superintendent and the plaintiff was entitled to a verdict.

Rule for judgment for defendant *n. o. v.*

H. Frank Eshleman for rule.
Coyle & Keller, contra.

June 23, 1917. LANDIS, P. J.—An examination of the testimony taken upon the trial shows that none of the essential facts in the case were in dispute. On July 25, 1914, the plaintiff was employed as a teacher in the Columbus school-house of Pequea School District, for the term of seven months, beginning in August or September, 1914. A written contract was entered into on that day, which was signed by the plaintiff and by the president of the school board on behalf of the school district. Thereby it was provided that the employment should be subject to the visitation of the county superintendent, and that the compensation should be "$50 to $55 (1—, $50, 1, $55) per mark per month." In pursuance of this agreement, the plaintiff entered upon his duties, and he continued to perform them during the whole term stipulated in the contract. He so far has received fifty dollars a month for his services, and he claims that there is due to him an additional sum of five dollars per month. Out of this claim, the present controversy arises.

During the year, the county superintendent visited the schools of he district, including the Columbus school. He thereupon, on March 17, 1915, sent a letter addressed to the secretary of the board of school directors of Pequea Township, in which he said: "I have the honor to report to you that I have given all the teachers of your district a number one mark, except the following-named persons, who have the rank indicated: Teacher: Verna Forry. Mark: 1—." He then added: "In forming a judgment of a

teacher's work, the following points were considered: The condition of the school room with reference to the purity of the air, the temperature, cleanliness and neatness, care for the eyes of the children as shown by the proper adjustment of the shades, the attitude of the teacher toward the children and toward visitors, the methods of instruction, and the grasp of the subject, the interest and the general spirit of the school, the enthusiasm and alertness of the teacher. In a short visit, the superintendent can form only a partially correct judgment of the work of a teacher. Directors should take into consideration their own impressions, and the errors in judgment made by the superintendent should be corrected by the board."

At a meeting of the school board held on March 27, 1915, the board, of its own motion, reduced the mark of the plaintiff from one to one-minus. The secretary thereupon wrote to the plaintiff, among other things, the following: "Although he has not changed your mark the board, after carefully and impartially considering work with reference to thoroughness and the manner in which the subjects were drawn out, and also being mindful of the duty to some of our other teachers, as well the patrons and taxpayers, has by a unanimous vote given your mark one minus (1—) with a corresponding salary $50.00." It was, therefore, claimed upon the trial that the school board had a right, in its discretion, to fix the mark, notwithstanding the action of the county superintendent, and, having used that discretion and fixed the lower mark, the plaintiff is not entitled to recover the amount which he would have received under the mark given him by the county superintendent.

Under section 403 of the School Code of May 18, 1911, P. L. 309, it is provided that the school directors of every school district are required, among other things, to fix the "salaries or compensation of officers, teachers or other appointees of the board of school directors." The salary or compensation is not required to be a specified and unchanging sum. It may be, and very often is, made dependable upon conditions thereafter arising, and this was the case under the terms of the agreement entered into between these parties. The written agreement fixed the compensation of the plaintiff according to the quality of his work, as shown by his mark. There was nothing unfair or illegal in such an arrangement. On the contrary, it was the best method for both parties, for it stimulated the plaintiff to render good service, and, on the other hand, it protected the school board against paying the larger price for inferior service. This is a common arrangement made throughout the state between boards of directors and their teachers. It is not a delegation of the duty of the school board in fixing the salary to some one else, but simply a fair way of arriving at the true value of the service. The contention of the learned counsel for the defendant upon this point seems to me to have no basis to rest upon. The inconsistency of his position is apparent. If the school board had no right to enter into such a contract, then the real question is not as to the difference between fifty and fifty-five dollars, but the whole proceeding being void, no payment should have been made by the shool board on account of the contract.

If, then, the school directors had, as we concluded they had, authority to make such an agreement the sole question to be determined was, what the true meaning of the instrument was. Of course, where the words of a writing are not doubtful, it is the duty of the Court to interpret them and to so instruct the jury, and I am disposed to think that the jury could have been, without error, told that the mark as designated in the contract was the mark of the county superintendent, and that it was intended by the parties that that mark should govern the compensation to be paid the plaintiff. But, as some doubt might arise concerning the settlement of the controversy in this manner as a question of law, the Court deemed it better to submit the question to the jury, in order that they might ascertain the meaning of the words as used in the agreement. In so doing, the defendant could suffer no harm. and the Court could retain the right to enter a judgment, if it concluded that the jury's finding was not in accordance with the law. However, as the verdict of the jury is now in accord with the opinion of the Court. it is clear that the submission was not injurious to the defendant.

I am of opinion that, under the circumstances, the defendant was not entitled to the verdict, and for that reason the rule for judgment for defendant *non obstante veredicto* is discharged.

Rule discharged.

C. P. of Lackawanna Co.

Jayne v. Jayne et al.

Husband and Wife—Desertion—Husband's Beneficial Ownership in Land.

When a son purchased an improved town lot, for his own use, with money in part borrowed from his mother on his oral promise to repay the same in certain installments, and caused the deed to be made in the mother's name as grantee, but without her knowledge or request, and for several years lived on the premises in undisputed possession, paying taxes and insurance, HELD, that the mother merely holds the legal title as trustee, while the beneficial ownership is in the son, and as such the property is liable to seizure for his debts, or other liabilities in the nature of debt, when reduced to judgment either at law or in equity.

In an action in equity where it is shown that such beneficial owner had wilfully deserted his wife and child without reasonable cause, removed to another state, and thereafter wholly neglected to provide for their maintenance, and he is directed to make certain monthly payments to the wife, the property may, in default of such payments, be seized and sold to recover the amount so awarded, and both mother and son be enjoined from disposing of or encumbering the same pending the sale.

As to what standing, if any, the mother may have to reclaim an unpaid balance of the loan out of the property. in absence of any agreement relating thereto, is a question to be determined on the distribution.

Bill and answer.

M. J. Martin and *E. D. Adair* for plaintiff.

J. W. Carpenter for defendants.

May 29th, 1917. NEWCOMB, J.—Plaintiff, a married woman, sues to enforce the husband's duty of maintenance by means of seizure of his lands and tenements. The facts are free from material dispute, so that the only questions in the case are those of law.

From the pleadings, evidence and arguments of counsel I find the following

CONCLUSIONS OF FACT.

1. The plaintiff is, and at all times with which the issue is concerned has been, the wife of Lawrence C. Jayne, hereinafter called the defendant, who, without any reasonable cause, abandoned and wilfully deserted her and their only child on the 30th day of August, 1915, at their home in this city, where plaintiff has at all times had her domicile. The desertion has been persisted in from that date ever since. It appeared at the trial that defendant was then living at Martinez, California, though his separate answer herein had been verified on his oath taken by and before a notary public in San Francisco, March 22, 1916. In the meantime, being without means of her own, plaintiff has supported herself and child, a son now nearly four years of age, by her own labor. Defendant has neither communicated with her nor contributed in any way to the support of either herself or her child, and has wholly neglected to provide for their maintenance in any degree whatsoever; though she has continued to occupy the house where they were living when he deserted her. This is the premises next hereinafter described, the ownership of which is alleged to be in defendant, though the legal title is in his mother, Gertrude E. Jayne. The latter and her husband are accordingly joined as co-defendants. For convenience the mother will be hereinafter referred to as Mrs. Jayne.

2. The premises sought to be charged with the relief prayed for is a town lot, with its improvements, fronting on the southwesterly side of Linden street, in this city, being thirty feet wide in front and rear, rectangular in shape and sixty-five feet deep. It is known and designated as lot No. 26, on map entitled "Spruks' Linden Street Plot," duly recorded in the proper office of this county in Map Book No. 1, at page 122. For more minute description reference is made to the third paragraph of the bill and also to the deed hereinafter recited. The improvements consist of a two-story frame dwelling house known as No. 1220 Linden street, and altogether the property is probably of the value of $5,000.

3. It was purchased by defendant at the price of $4,500, by article of agreement in writing with Edward J. McCabe, the then owner, dated August 1, 1913. Later, the same month, the sale was consummated by formal deed in fee—not to defendant, however, but to Gertrude E. Jayne, his mother. The deed, dated August 15th, was delivered to defendant the 20th, and by him placed upon record the 21st of August, 1913, in the proper office of this county, in Deed Book 271, at page 36. It had been so drawn at his sole instance. The first knowledge that she was the nominal grantee came to Mrs. Jayne casually after the date of record.

4. She had nothing whatever to do with the purchase or its consummation. That had been negotiated wholly by defendant for his own use and benefit. He had made the

down payment of $1,000 out of his personal funds then in hand. The balance was payable within thirty days thereafter, and finding it necessary to raise part of the money by loan, he borrowed from his mother the sum of $2,160 upon his oral promise to repay it in monthly instalments of $30 with interest at the rate of 4½%, coupled with his declaration that he would make it secure, or words to that effect. What form or character of security he had in mind, if any, wasn't mentioned. He took the mother's check to his own order, deposited it in bank with other moneys standing to his credit, and afterwards applied it to the payment of the balance of the purchase money.

5. Mrs. Jayne now makes no claim of ownership, but looks to the property to secure the unpaid balance of the loan together with such expense on account of the insurance and taxes as she has incurred since defendant absconded. It was he who took possession when the deed was delivered and that possession has never been disturbed. It was he who paid the cost of insurance and the taxes so long as he remained here. The insurance was in his name, and Mrs. Jayne had none in her name until his policy expired after he ran away. Other than that and the payment of taxes in recent years, no act suggestive of either control or ownership has at any time been exercised by her. The money so paid was $89.61 for taxes and $28 for insurance.

6. The stipulated payments were made by defendant and accepted by Mrs. Jayne until January, 1915, inclusive. These were made by check. The last one on account of principal bore the notation "payment No. 17." Thereafter the interest was paid to the following month of July. The balance owing by defendant on account of the loan is now $1,650, with interest from July 1, 1915.

7. Another subject of the bill is defendant's household furniture. Just before the date of his desertion he had raised the sum of $200 by pledging the furniture to a loan company in this city. The parents are charged with complicity in that transaction coupled with the allegation that they afterwards succeeded to the rights of the pledgee by transfer, with intent to deprive plaintiff of the goods. This averment is not made out. True, that loan was paid the following month by either Mr. or Mrs. Jayne, though I cannot find that the bailment contract was assigned to them or either of them. At all events, plaintiff is in possession, and if her right should at any time be questioned it can be tested in a proceeding at law which will afford an adequate remedy.

8. Defendant left an employment in this city at a salary of $100 per month. In the 8th paragraph of the bill it is averred that he is in good health, capable of earning that amount, and otherwise of sufficient ability to suitably support and maintain his wife and child. The averment is not denied, but on the contrary admitted by the several answers; and the fact is accordingly so found. It is also noted that on August 28, 1915, defendant had upwards of $500 in bank—made up in part of the $200 above mentioned—which he drew on that date.

9. The relief asked for is contested only on technical grounds as an attempt to convert Mrs. Jayne's legal title either (1) into a trust, contrary to the provisions of the Act of 22 April, 1856, P. L. 532; or (2) a mortgage as against the Act of 8 June, 1881, P. L. 84.

The facts are believed to warrant the following

CONCLUSIONS OF LAW.

1. As against her husband the plaintiff is entitled to relief proportioned to his circumstances and the station in life to which the wife had been accustomed so long as they lived together. Such relief should date from the time of desertion, say September 1, 1915, having regard to the valve of his real property, the amount of cash traced to his hands when he abandoned his wife, and his admitted earning capacity and ability at all times to suitably maintain her.

2. Defendant, Lawrence C. Jayne, should pay to his wife the sum of thirty-five dollars per month from the date of desertion, the first payment thereof to be deemed to have become due and payable in the month of September, 1915, and the like sum successively each and every month thereafter. Thus the arrears for which he is liable at this time will amount to the sum of seven hundred and thirty-five dollars to June 1, 1917.

3. The Linden Street property described in second Conclusion of Fact is chargeable with the payment thereof for the reason that it was bought by defendant for his own use and wholly paid for with his own moneys, though in part borrowed from his mother.

4. Gertrude E. Jayne must be regarded as the mere holder of the legal title to the property as trustee, while the beneficial

ownership is in the defeendant, Lawrence C. Jayne. As such the property is subject to seizure for his debts, or other liabilities in the nature of debts when reduced to judgment either at law or in equity.

5. What standing, if any, Gertrude E. Jayne may have to reclaim the unpaid balance of her loan out of the property is a question which does not arise on this issue and need not be considered. It can be determined only on distribution; but she should be enjoined as stated below. The costs should be paid by Lawrence C. Jayne.

6. A decree should accordingly be entered substantially as follows:

(1). Enjoining both Gertrude E. Jayne and Lawrence C. Jayne against disposing of or encumbering the lands and tenements described in the second Conclusion of Fact;

(2). Charging said premises with the payment of the money hereinabove awarded to plaintiff, to wit, the sum of $735 already accrued and the further sum of $35 per month to be computed from June 1, 1917;

(3). Directing the seizure and sale of the premises to enforce this decree if for the period of thirty days after the same shall have been formally entered, the defendant, Lawrence C. Jayne, shall neglect to pay said arrears, or shall make default for the like period in and about any future instalment as the same shall accrue.

(4). Directing said Lawrence to pay the costs of this proceeding.

C. P. of Lackawanna Co.

Joyce's Petition.

Actions—Form—Settling Title to Land.

Neither a rule to bring ejectment under Act April 16, 1903, P. L. 212, nor a petition for an issue under Act June 10, 1893, P. L. 415, is an appropriate remedy to settle title to land, where the petitioner's right, if any, arises from a parol promise by the holder of the legal title, tending to establish a resulting trust in her favor. The petitioner should proceed by bill in equity to first establish the resulting trust claimed in her petition.

Rule to bring ejectment.

Houck & Benjamin for petitioner.

O'Brien & Kelly, contra.

May 14, 1917. EDWARDS, P. J.—The petition in this case is filed under the Act of April 16, 1903, P. L. 212.

While the petition and answer are quite voluminous we shall refer to two facts only, which, in our judgment, control the determination of the controversy.

First. According to the petition itself, supplemented as it is by the answer, the record title to the property located on Colfax Avenue, Scranton, is in Patrick Langan. He has a deed in fee simple, which has been of record since 1907.

Second. The petitioner, Nellie Joyce, has no paper title of any kind. If she has any right at all, it arises from a parol promise on the part of Patrick Langan, the brother, tending to establish a resulting trust in favor of the sister, Nellie. According to the eighth paragraph of the petition the brother promised "that with the proceeds" of the sale of the Emmett Street property "he would purchase a lot on Colfax Avenue, build a double house on the same and convey to said Sarah Langan (the mother) and Nellie Langan (now Nellie Joyce) a life estate in their choice of the two sides of said double house and corresponding portion of said lot, for the life of them and the survivor of them," etc.

We add that the possession claimed by the petitioner is denied in the answer, wherein it is alleged that she is a tenant by sufferance only since the death of the mother in 1916. No depositions have been taken on either side, so that the question of possession and the character of the possession, affirmed by one party and denied by the other, is not established. On account of the nature of the answer the petitioner moved to amend the rule so as to allow the court to frame an issue under the Act of 1893.

We are of the opinion that the petitioner has mistaken her remedy. She ought to proceed in equity to first establish the resulting trust claimed in her petition. The Act of 1889, as amended by the Act of 1903, P. L. 212, was not intended to apply to a case like the one at bar.

The rule to bring ejectment is discharged.

SUPREME COURT

City of York's Appeal.

[BRUGGEMAN ET AL. v. CITY OF YORK, No. 3.]

Negligence — Remote Cause — City Street.

Plaintiff brought suit to recover damages for loss of eyesight caused by filth from a gutter entering her eye, by reason of a broom, with which she was cleaning the gutter, catching at a wire therein. The court below (Ross, J.,) submitted the question of negligence to the jury, which found for the plaintiff. A motion for judgment for the defendant *n. o. v.* was overruled. HELD, to have been error.

Defendant's motion for judgment *n. o. v.* should have been granted on the ground that the negligence complained of was not the proximate cause of plaintiff's injury.

The foul mud in the street was the condition and perhaps remote cause of the injury, but the coiled wire which threw the mud in plaintiff's face, as she pushed it with her broom, was the immediate, unrelated and intervening cause of the accident.

The immediate cause was not set in motion by the original wrong doer, nor was it the result of an unbroken succession of events, or of concurring causes.

No. 125, August Term, 1914.

Appeal from the judgment of the Court of Common Pleas of York County, Pa.

The other questions of law and fact arising from the raising of the grade of a lot on which defendant city was erecting a fire engine house, and the filling and bridging of a gutter for the purpose of more readily entering on the lot, are found in Bruggeman et al. v. City of York, 29 YORK LEGAL RECORD 19; Bruggeman v. City of York, 29 YORK LEGAL RECORD 85; Bruggeman's Appeal, 30 YORK LEGAL RECORD 48; City of York's Appeal, 30 YORK LEGAL RECORD 53.

The third litigation arose from the attempt of the plaintiffs to recover damages for the loss of an eye, by reason of defendant city's negligence in allowing the gutter of a city street to remain in a filthy condition, which filth was occasioned by a change of grade of a lot and obstruction of the natural drainage. The jury having found for the plaintiff a motion was made for judgment for defendant *n. o. v.* A motion to have the court *in banc* hear the same was refused; Bruggeman et al. v. City of York, No. 2, 30 YORK LEGAL RECORD 205; and the judgment *n. o. v.* was also refused, by Ross, J.; Bruggeman et al. v. City of York, No. 3, 31 YORK LEGAL RECORD 1.

From the judgment there entered this appeal was taken.

John L. Rouse for appellant.

Niles & Neff for appellee.

June 30, 1917. WALLING, J.—This is an action for personal injuries resulting, as alleged, from an accumulation of filth in a public street. In 1912, defendant city built the Eagle Engine House on a lot located on the west side of Jessop place, between Jackson street and Rose alley in said city; and in so doing raised the grade of the lot and to make a convenient roadway thereto filled up the brick gutter on the north side of the property. The land descended to the west and raising the grade of the lot and stopping up the gutter caused the water in wet weather to overflow the street and make a large pool, sometimes covering parts of the adjoining lots, especially plaintiffs' lot, located on the Northeast corner of Jessop Place and Rose Alley. The gutter extended from the East down Rose Alley across Jessop Place, and seemed to be in the nature of an open sewer; for when the stagnant water, caused by the filling of the lot and gutter as above stated, would evaporate, germ ladened filth with foul odors would be there found. This would seem to have constituted a nuisance, which the defendant, although having notice, failed to abate until after the occurrence in question.

On October 21, 1912, the plaintiff, Mrs. Bruggeman, took a broom and went out to clean up some of the filth so deposited in the alley in front of her home, and, in an effort to remove a coil of wire which had become lodged in the pavement or gutter, she pushed it with the broom so that it sprung back, and in so doing sent a splash of the street mud into her face and left eye, thereby causing, as the jury found, the loss of the sight thereof. There was nothing to indicate that defendant was in any manner responsible for the presence of the wire in the street. The trial judge submitted the case to the jury, including the questions of negligence, proximate cause, etc. The jury found for the plaintiffs and the court overruled defendant's motion for judgment *non obstante veredicto* and entered judgment on the verdict; hence this appeal.

In our opinion defendant's motion for judgment should have been granted on the

ground that the negligence complained of was not the proximate cause of plaintiff's injury. "A proximate cause, in the law of evidence, is such a cause as operates to produce particular consequences without the intervention of any independent unforseen cause without which the injuries would not have occurred;" 21 American and English Encyclopedia of Law (2 Ed.) 485. "A proximate cause is one which, in actual sequence, undisturbed by any independent cause, produces the result complained of;" Behling v. Pipe Lines, 160 Pa. 359. "A prior and remote cause cannot be made the basis of an action if such remote cause did nothing more than furnish the condition or give rise to the occasion by which the injury was made possible, if there intervened between such prior or remote cause and the injury a distinct, successive, unrelated and efficient cause of the injury;" 29 Cyc. 496. Here the foul mud in the street was the condition and perhaps remote cause of the injury, but the coiled wire which threw the mud in plaintiff's face, as she pushed it with her broom, was the immediate, unrelated and intervening cause of the accident. The mud was passive; the active agent was the wire when set in motion by the broom, and aside from it the accident would not have happened. We see no difference in principle between mud being thrown by a wire and fire being carried by water, and in the latter case the water was the intervening cause; Hoag and Alger v. Lake Shore and Michigan Southern Railroad Co., 85 Pa. 293; as was the fall from the ladder, and not the exposed live electric wire, in Elliott v. Allegheny L. Co., 204 Pa. 568, and as was the breaking of the traces and not the want of a guard rail in Willis v. Armstrong County, 183 Pa. 184. And such intervening cause may be either animate or inanimate; and where two distinct causes are successive and unrelated in their operation, one of them must be the proximate and the other the remote cause; Herr v. City of Lebanon, 149 Pa. 222. The act of a child may be the proximate cause: Rhad v. Duquesne Light Co., 255 Pa. 409; Swanson v. Crandall, 2 Pa. Super. Ct. 85. The final result here cannot be said to be the natural and probable result of defendant's negligence. See King v. Lehigh Valley R. R. Co., 245 Pa. 25.

The rule is well settled, "that the injury must be the natural and probable consequence of the negligence; such a consequence as under the surrounding circumstances of the case might and ought to be foreseen by the wrong doer as likely to flow from his acts;" Swanson v. Crandall, *supra*; while such an injury as here complained of could not be foreseen as a result of permitting mud and filth to remain in a roadway; nor could it be forseen that any personal injury would result therefrom to a person upon the sidewalk. The immediate cause here was not set in motion by the original wrong doer, nor was it the result of an unbroken succession of events, or of concurring causes.

The facts being undisputed, the question of proximate cause is for the court; Douglass v. Railroad Co., 209 Pa. 128; Pass. Ry. Co. v. Trich, 117 Pa. 390. We do not deem it necessary to decide whether a municipality is liable for personal injuries resulting from the unsanitary condition of its streets.

The judgment of the court below is reversed and is here entered for the defendant.

Fetrow's Estate. No. 2.

[RUPP'S APPEAL.]

Will—Life Tenant—Contingent Remainders—Period of Vesting—Survivorship.

Testator devised certain real estate to D for life and directed that at her death it shall be sold and the proceeds "equally divided among the surviving devisees named in my will, or their legal representatives." The auditor distributed the proceeds of sale of the real estate amongst the devisees who survived the testator or their legal representatives. On exceptions filed, the court below, WANNER, P. J., held that the entire fund should have been awarded to the executors of F, who was the only legatee who survived the life tenant. On appeal, HELD, to have been error, and that the Auditor's report must be confirmed.

The reasonable interpretation of the phrase "surviving devisees or their legal representatives," is to refer the word "surviving" to testator's death and construe "or their legal representatives," as intended to prevent the lapse of the shares of any legatees who might die before the time for distribution should arrive.

This interpretation placed upon the phrase avoids intestacy and secures equality of distribution among the legatees.

Appeal from the decree of the Orphans' Court of York County, Pa.

For the report of the Auditor (McClean Stock) making distribution, and the opinion of the court below (WANNER, P. J.,) sustaining exceptions to the Auditor's report, see Fetrow's Estate, 30 YORK LEGAL RECORD 141.

From that decree this appeal was taken.

Cochran, Williams & Kain for appellant.

Jacob E. Weaver and *D. H. Yost* for appellee.

June 30, 1917. POTTER, J.—Joshua Fetrow died February 25, 1884, leaving a will which contained the following provision: "I give devise and bequeath unto Lucinda Dietz, widow of Daniel Dietz, deceased, now living with me during her natural life, the house and land situate in said Spring Garden Township, adjoining the Codorus Navigation, Loucks Mill Road and lands of Daniel Immel and Alexander Hay and being the same premises lately occupied by Joseph Sample. She to have and hold the same and keep it in repair during her natural life at her death the same to be sold and the proceeds thereof to be equally divided among the surviving devises (devisees) named in this will or their legal representatives."

Lucinda Dietz, who subsequently married John Rutter, died December 15, 1914, and the property devised to her for life was sold by George A. Fetrow, administrator d. b. n. c. t. a. of Joshua Fetrow.

The question here in controversy, is whether, when the testator directed that the proceeds of the real estate in which he devised a life interest to Lucinda Dietz, "be equally divided among the surviving devisees named in this will or their legal representatives," he intended that the recipients of his bounty should be the devisees who were living at the time of his own death, or those only who would survive the life tenant. The auditor held that he intended the former, while the court below was of the opinion that the latter was intended. In the one case the legacies would vest at the death of the testator, and in the other at the death of the life-tenant. As only one of the devisees, Michael Fetrow, survived the life-tenant, the court below held that he took the entire fund and awarded it to his executors.

The general rule in Pennsylvania is, and always has been, that the words "survivor" or "surviving" following a prior gift, are understood as referring to the death of the testator, unless a contrary intention is apparent; Shallcross's Estate, 200 Pa. 122; Woelpper's Appeal, 126 Pa. 562; Ross v. Drake, 37 Pa. 373. We find nothing in the will of Joshua Fetrow which discloses an intention that the words "surviving devisees" are to apply to a period other than that of testator's death. In order to make them apply to the period of the life-tenant's death, the court below inserted the additional word "then"." But that word is not found in the will, in that connection. It also became necessary practically to ignore the words "or their legal representatives." It is true that the court suggests that these words were intended to provide an alternative distribution of the fund in the event of all the legatees named in the will dying before the death of the life-tenant. But the result of such a construction is that in case one of the legatees survived the life-tenant, which actually occurred, the words "or their legal representatives" are given no effect whatever.

We think the reasonable interpretation of the phrase "surviving devisees or their legal representatives," is to refer the word "surviving" in accordance with the rule, to testator's death and construe "or their legal representatives" (whether meaning executors and administrators, heirs or next of kin), as intended to prevent the lapse of the shares of any legatees who might die before the time for distribution should arrive. The court admits that the words must have been given that meaning, if all the legatees had died before the date of the life-tenant's death. It is not probable that the testator intended that, if none of the legatees should live to share in the fund, the legal representatives of all should take, but if one only should survive, the legal representatives should all be excluded. We think the construction adopted by the auditor was in accordance with the testator's intention. If "surviving" refers to the death of the life-tenant, as was held by the court below, then the death of Michael Fetrow during the life tenancy would have created an intestacy. The interpretation placed upon the phrase by the auditor avoids intestacy and secures equality of distribution among the legatees. We think the testator evidently intended that the proceeds arising from the sale of the property should be divided among certain persons, who were definitely determined by his will as construed in Fetrow's Estate, 58 Pa. 424, and the legal representatives of such of them as predeceased the life-tenant.

The assignments of error are all sustained, the decree of the court below is reversed, and the record is remitted that distribution may be made in accordance with the report of the auditor.

Delone's Appeal.

[BANK OF HANOVER v. GITT ET AL.]

Partnership—Evidence of.

Gitt and Delone agreed with Johns to take over his property, make specific payments and retain the residue for their own use. They continued Johns' business, and in due course Gitt endorsed two notes in the business name; on which suit was brought. Delone denied the existence of a partnership, and there was no evidence to that effect. HELD, that the court below (ROSS, J.,) properly entered a compulsory non-suit.

The "residue" could not be regarded as profits, but as compensation of the assignees dependent upon the skill and ability displayed in settling the affairs of the estate.

The fact that Delone retained some of the collateral security given with the customer's note has nothing to do with the question of partnership. Under the agreement it was defendants' duty to collect all indebtedness due Johns, for which they must account as trustees.

No. 106, January Term, 1915.

Appeal from the judgment of the Court of Common Pleas of York County, Pa.

For the opinion of the court below, ROSS, J., see Bank of Hanover v. Gitt et al., 30 YORK LEGAL RECORD 17.

Niles & Neff for appellant.

V. K. Keesey for appellee.

June 30, 1917. POTTER, J.—This is an appeal from the refusal of the court below to take off a judgment of compulsory non-suit. The action was assumpsit brought to recover from the defendants, as partners, the amount of two certain promissory notes made by L. M. Long & Co., to the order of S. L. Johns Cigar Company, and endorsed in that name by H. N. Gitt, and by H. N. Gitt personally. In plantiff's statement of claim it was averred that, on the dates of the notes in question, "H. N. Gitt and Charles J. Delone were co-partners, trading and doing business under the name of S. L. Johns Cigar Company," and that the notes "were taken, endorsed and delivered to the plaintiff in and about the business of the said co-partnership of H. N. Gitt and Charles J. Delone, trading and doing business as S. L. Johns Cigar Company, and for the benefit and in the business of the said co-partnership."

The defendant, Gitt, made no defense to plaintiff's demand, but Charles J. Delone filed an affidavit of defense, in which he denied that he was a co-partner with Gitt, or had traded as S. L. Johns Cigar Company, or was in any way liable on the notes in suit.

Upon the trial, at the close of plaintiff's evidence the court entered judgment of compulsory non-suit, upon the ground that no partnership had been made out, and no liability upon the part of Delone had been established. Plaintiff has appealed, and its counsel contend that the evidence offered was sufficient to establish the fact that the defendants purchased property which they employed for their mutual profit, and that the obligations upon which this action was brought, were incurred in the management of a business from which they were jointly entitled to the net profits, and in which, it is argued, they were, therefore, partners.

In an article of agreement which was offered in evidence, it was set forth that, being desirous of relief from the cares growing out of the involved condition of his business affairs, S. L Johns, upon the conditions named, turned over his entire estate to Gitt and Delone for the purpose of administration. They were to convert the property into cash as in their judgment should be advisable. The proceeds were to be applied, first in payment of the claims of creditors, then in payment of an annuity to Johns for ten years, and after that the fixed sum of $40,000 was to be paid to him. In addition they were to pay to Johns or his heirs such sum as should be necessary to acquire a clear title to his residence and contents, and to a certain farm property with stock and implements. Provision for the payment of certain other sums was also made, and if Gitt and Delone succeeded in these undertakings, they were to retain for their own use "all the proceeds and property remaining after the above provisions have been complied with." It thus appears that while Johns made an absolute conveyance of his property to Gitt and Delone, they took it only for the purpose of liquidation, and subject to the payment of all the indebtedness of Johns, and of the various other sums specified. They were to have for themselves only the residue which might be left after those payments were made. A division of the product between tenants in common does not make them partners, although they may have contributed labor or money to raise it. No presumption of partnership arises from the mere fact of co-tenancy; Taylor v. Fried, 161 Pa. 53. The defend-

ants in this case were clearly trustees of the property and were liable to account as such; Ahl's Appeal, 120 Pa. 26. We find nothing in the agreement which expressly constitutes the defendants actual partners, and the record is bare of evidence tending to show that they ever held themselves out to the public as such, nor did it appear that the plaintiff in this case extended credit to them as partners. The testimony shows that the notes in question represented old indebtedness of L. M. Long & Co. to the Cigar Company. All the negotiations with the bank were conducted by H. N. Gitt, who endorsed the notes, signing the name of S. L. Johns Cigar Company, and also endorsing as an individual. The defendant, Delone, had nothing to do with the negotiation of the notes. The agreement discloses no intention that the business should be carried on for the purpose of making profits, nor does it appear that any were realized. It was only after the indebtedness of Johns had been discharged, and the various sums specified had been paid, and the plan had been successfully carried out by Gitt and Delone, that they were to retain whatever money remained in their hands, as compensation for their services. Such a sum could not fairly be regarded as the profits of a business venture. More properly speaking, it would be residue derived from the corpus of the assigned estate, as the entire transaction was in the nature of an assignment for the benefit of creditors, with the compensation of the assignees dependent upon the skill and ability displayed in settling the affairs of the estate.

In their argument, counsel for appellant make specific complaint of the action of defendant, Delone, in retaining certain shares of telephone company stock which was obtained as partial security upon the indebtedness of L. M. Long, evidenced in part by the notes in question. We do not see, however, that this has anything to do with the question of partnership. Under the agreement, it was the duty of Gitt and Delone to collect this indebtedness, as well as all other sums due to Johns, and as trustees they are liable to account to Johns, and perhaps his creditors, for the monies they received. But in the present suit the effort is to hold them as partners, and not as trustees. Our examination of the record leads us to agree with the conclusion of the court below that the evidence does not show that there was any understanding between Gitt and Delone as to any sharing of profits, nor did it appear that Delone in any way gave plaintiff reason to belive that any partnership existed between Gitt and himself. The non-suit was properly entered, and the refusal to take it off was justified.

The judgment is affirmed.

Pennsylvania Water and Power Co.'s Appeal.

[VANDERSLOOT v. PENNSYLVANIA WATER AND POWER CO.]

Equity—Jurisdiction—Service out of County.

Plaintiff below (appellee) presented his petition, alleging that while the lands, tenements and hereditaments concerning which suit was brought are located in York County, the defendant corporation had no office or place of business in actual operation in said county; but averred that defendant's business offices were in New York City, and that it had a place of business in Lancaster County, and further prayed that service might be made at those places. The petition was granted (Ross, J.), and a motion to set aside the service was subsequently denied. HELD, to be error.

The Act of April 6, 1859, P. L. 387, does not apply to persons or property outside the jurisdiction of the court.

Having entered a conditional appearance, defendant had a right to appeal from the order refusing to set aside the service out of the county.

The court fell into error by relying exclusively on the averments in the bill, and failing to take into account the controlling importance of the prayers for relief.

No. 1, October Term, 1916.

Appeal from the decree of the Court of Common Pleas of York County, Pa.

For the opinion of the court below, Ross, J., see Vandersloot v. Pennsylvania Water and Power Co., 30 YORK LEGAL RECORD 189.

John E. Melone and *Stewart & Gerber* for appellant.

Niles & Neff for appellee.

June 30, 1917. MOSCHZISKER, J.—The defendant, a corporation under the laws of Pennsylvania, possesses and operates a dam across the Susquehanna River. The plaintiff filed a bill in equity, alleging that this obstruction backs the water upon certain property owned by him in York County, where, he averred, one end of the dam is located. The bill prayed, (1) That defendant be ordered to remove the dam and certain obstructions connected therewith,

"or such parts thereof as shall allow the water of said river to run in its usual and natural course * * * as it did before the erection, maintenance and operation of said dam, structures and works of the defendant"; (2) That defendant be restrained from increasing the height of its dam; (3) "That defendant be enjoined from maintaining and operating its said dam and works or other obstructions in said river * * * in such manner as shall cause the water thereof to back and overflow the property of the plaintiff"; (4) "That defendant be perpetually enjoined from placing and maintaining any dam, structure or works * * * as shall increase the depth of the water * * * thrown or flowing upon plaintiff's said property"; (5-7) That defendant be enjoined from flooding certain roads, tow-paths, banks, etc., claimed to be the property of plaintiff; (8) That an account be taken of the damages suffered by plaintiff, and defendant be "decreed to pay the same"; (9-11) "Discovery, general relief," etc.

The defendant's mill and works are located in Lancaster County, where it maintains an office; but its headquarters are in New York City. On the day the bill was filed, plaintiff petitioned for an order allowing service on defendant outside the jurisdiction of the Common Pleas of York County; whereupon the Court below decreed "that service of the bill be made upon * * * the defendant in the manner directed by the Act of April 6, 1859." The sheriff returned that he had made such service on the president and secretary of the corporation at its office in New York City. On September 13, 1916, the sheriff of York County deputized the like officer of Lancaster County to make service in the latter's jurisdiction; and, on September 16, 1916, the last mentioned sheriff made return that he had served the bill, etc., on "the agent of defendant and the person for the time being in charge of its office" in Lancaster County. September 28, 1916, counsel for defendant entered an appearance de bene esse, for the purpose of attacking these two returns. The court below dismissed a motion to set aside the service, stating, inter alia, "the plaintiff's bill contains the only facts upon which the court can yet rely; and an inspection thereof clearly reveals a suffcient subject matter within the jurisdiction of this court to warrant the court in authorizing process of service on the defendant in accordance with the provisions of the Act of April 6th, 1859, P. L. 387, Sec. 1 * * * * * It might be that facts or matters would be revealed by regular and legal investigation which would render the jurisdiction of this Court nugatory; but, until * * * properly shown, we cannot assume * * * that any such conditions exist." The defendant has appealed.

The Act of 1859, supra, provides that any Court of the Commonwealth having equity jurisdiction may upon due application authorize service outside the jurisdiction of such Court, in any suit "concerning * * * lands, tenements and hereditaments * * * situated or being within the jurisdiction of such court * * *." In Coleman's Appeal, 75 Pa. 441, 443, 457, 458, the averments of the bill related to property both within and outside the jurisdiction of the Court, and it prayed, (1) That a certain company defendant "transfer to plaintiff ninety-eight shares of its stock" (being the property within the jurisdiction); (2) That one Walton Dwight (the principal defendant) account and pay to plaintiff a designated sum of money; (3) That two other persons be made defendants; (4) General relief. The court below set aside service upon the defendant Dwight, had under the Act of 1859, supra, and on appeal we affirmed, saying, "It has not been the policy of our jurisprudence to bring non-residents within the jurisdiction of our courts unless in very special cases * * * The Act of 1859 ought, therefore, to receive a construction in harmony with this policy. There exists no good reason why courts of equity should be invested with a more enlarged jurisdiction against non-residents than courts of law. On the contrary * * * the inclination should be in a different direction * * * Had the bill in this case been confined to the prayer for relief as to the ninety-eight shares of the capital stock of the Williamsport and Canada Lumber Company, standing on their books in the name of the defendant Walton Dwight, there would be plausible ground upon which to sustain the service of the process upon him * * * We are of opinion that the bill must be confined, at least so far as the interest of the foreign defendant is involved, to a prayer for a decree affecting only the property in question. If it goes further and asks for relief by a decree against the defendant, personally, * * it is not a case within the purview of the act, and the court has no authority to

direct service of process upon the defendant."

In the case at bar, it will be observed that the prayers for relief are not confined to property alleged to be within the jurisdiction of the court; but, on the contrary, they comprehend relief affecting the entire dam of defendant, extending into the river beyond the limits of York County, and also relief which, if granted, would require a decree against the defendant personally. On this state of facts, under the authority just cited, the present is not a case for service in accordance with the Act of 1859, supra; and the Court below erred when it determined otherwise.

The plaintiff contends, however, that, since our equity rule 10 provides that "service of the bill and notice to appear and answer on a corporation shall be effected in the mode prescribed by law for the service of a writ of summons upon such corporation," the service by the deputized sheriff of Lancaster County is good and sufficient in this case, without regard to that had under the Act of 1859 (citing Sec. 42 of the Act of June 13, 1836, P. L. 568; Act of March 17, 1856, P. L. 388; Act of July 9, 1901, P. L. 614, as amended by the Act of April 3, 1903, P. L. 139; and the Act of June 5, 1915, P. L. 847); but there is nothing in rule 10, or any of the acts of assembly relied upon by plaintiff, which confers the right upon a court in equity to bring a corporation, which otherwise would be without its jurisdiction, within the grasp of its process, so as to subject such defendant to a decree in personam or one affecting its property located in another county. We have examined the cases cited by plaintiff, but none of them supports the order appealed from.

The question of the right to take the present appeal was also argued before us. In McCullough v. Railway Mail Asso., 225 Pa. 118, 124 and 123, a rule to avoid service of a summons was discharged; whereupon defendant went to trial. The verdict favored plaintiff, and defendant appealed, assigning as error, inter alia, the discharge of the before mentioned rule; but we said: "The defendant association entered a conditional appearance for the purpose of moving to set aside the service of the summons * * * After the court had refused the motion, the association * * * entered a plea in the case; this action must be regarded as * * * a waiver of any irregularity or insufficiency in the service of the writ." While we dismissed the assignment in question, as not calling for an actual ruling upon the situation which it sought to bring before us, yet we discussed at large the principles of law and practice involved; and during the course of that discussion we held that, if a defendant's motion to set aside the service of the writ against him be refused, "he may rely upon the position he has taken and attempt to sustain it by an appeal to the proper Appellate Court, or he may consider himself in court and defend the action on its merits," adding, "He is required to select one of the two courses, and having done so he must accept the legal consequences of his action. He cannot deny the jurisdiction of the court, and at the same time take such action to defeat the plaintiff's claim as will amount to an appearance." Under this authority, which is our latest ruling upon the subject, the defendant had a right to appeal from the order here complained of.

If the procedure determined upon by the court below were followed, and this case set for trial on the merits, so that, incidentally, it might be ascertained whether facts would develop "which would render the jurisdiction of the court nugatory," then, under the principles laid down in McCullough v. Railway Mail Asso., supra, if the defendant should appear and defend, it would be in court for all purposes, and a decree in personam could be entered against it; which decree would be enforcible by proceedings in contempt, despite the provisions of Section 3, Act of 1859, supra, that no such process should issue thereunder. The learned court below fell into error by relying exclusively upon the averments of the bill, and failing to take into account the controlling importance of the prayers for relief. (Coleman's Appeal, supra); when the latter are kept in mind, without the need for further light upon the subject, it becomes clear that the attempt to secure jurisdiction under the Act of 1859 was "nugatory," and that the rule to avoid the service made upon defendant should have prevailed.

The assignment of error is sustained, the order of the court below reversed, and service of the bill set aside; appellee to pay the costs.

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SUPERIOR COURT

Eyster's Appeal.

[CITY OF YORK v. EYSTER.]

Municipal Lien—Paving—Discrimination.

Plaintiff city (appellee) paved the street in front of appellant's property, and assessed the cost thereof by the foot front rule. Other streets, prior to this, having been paved at the sole cost of the city, defendant contended that plaintiff was estopped from attempting to collect the cost by assessments on the adjoining property owners; but the court below, Ross, J., entered judgment for the plaintiff. HELD, that the judgment must be affirmed.

There is nothing in the Act of June 27, 1913, P. L. 532, which by any reasonable construction changes the existing law, that the city might use either plan of payment. When the municipality had one system of payment for certain streets it was not prohibited from adopting another system for different streets.

If a gross abuse of discretion is perpetrated in determining what streets or parts of streets should be paved wholly at the city's expense, and what streets should be paved at the expense of the abutting owner, the complaining parties should move to determine that question before a large expenditure of money had been made on the faith of the ordinance providing for the improvement.

The location of the population, the use made of the streets, and many other considerations enter into the question of how the payment of the improvement shall be made. This must be determined by the local government and courts should not interfere unless a palpable injustice warranted it.

The Act of June 27, 1913, P. L. 582, is not unconstitutional, as a whole, on the ground that it violates the provision against a bill containing more than one subject.

The Act of June 4, 1901, P. L. 364, as amended by the Act of March 19, 1903, P. L. 42, requires, where the contractor performing the work is to be paid by assessment bills, the lien is to be filed to his use, and one month's notice must be given to the owner of the property to be affected. Improvement bonds were issued, containing a clause that "the bonds shall rest alone upon and be payable out of said assessment, and from no other fund." The lien was filed by the city, and no notice of filing given. For this reason the court below was asked to find as a fact that the lien was void and enter judgment for the defendant, but refused. HELD, not to be error.

As between the bondholder and the city, the city's liability would not end if its officers were negligent or careless in their collection, and its responsibility would not cease if there should be a diminution in the amount of those collections, occasioned through the voluntary act of the city.

The ordinances authorizing paving need not contain the clause relative to reductions in assessment for irregularly shaped lots.

If such reductions are not made the affidavit of defense should set forth that the amount of the lien is unjust by reason of such failure.

Appeal from the judgment of the Court of Common Pleas of York County.

No. 45, August Term, 1915.

For the opinion of the Court below, Ross, J., at the trial, without a jury, of the *sci. fa.*, see City of York v. Eyster, 29 YORK LEGAL RECORD 193.

The findings of fact and conclusions of law were excepted to, but the exceptions were dismissed; City of York v. Eyster, 30 YORK LEGAL RECORD 29.

From the judgment there entered this appeal was taken.

James G. Glessner and *Cochran, Williams & Kain* for appellant.

John L. Rouse and *Niles & Neff* for appellee.

July 13, 1917. KEPHART, J.—The street in front of appellant's property was paved under ordinances of council and the cost thereof assessed by the foot front rule. Other streets in the city of York had been paved by the municipality, at its sole cost and expense, prior to the improvement of this street. Appellant's counsel contend that under the Act of 1913 the city has power to adopt any one of the methods specified in the Act for paying the cost of an improvement, but when once they exercise that power, the method adopted must apply to all future paving, grading and macadamizing throughout the city; it cannot thereafter pay the cost of improving other streets by any of the other methods specified in the Act. We cannot agree to this proposition.

Section 10 of the Act of June 27, 1913, P. L. 582, authorizes cities of the third class to provide for the payment of the cost and expenses of paving, grading or macadamizing any public highway. It may be done in whole or in part by the city or by the owners of real estate abutting on the improvement; the cost and expense, when paid by the abutting owners, shall be assessed according to the foot-front rule or according to benefits, as council may by ordinance determine. This section of the Act does not materially change the law as it existed under Section 10 of the Act of 1889, P. L. 288, as amended by the Act of May 16, 1901, P. L. 224. The power of the legislature to

provide for assessments for special benefits in local improvements is too well settled to require discussion. It was held in Scranton v. Bush, 160 Pa. 499, that under the Act of 1889 the city might use either plan of payment; when the municipality adopted one system of payment for certain streets it was not prohibited from adopting another system for different streets. We find nothing in the Act of 1913 which by any reasonable construction changes the law as it then existed. The Act does not attempt to restrict the power of the city to determine the various methods of payment that should apply to its streets. The city does not exhaust its power when a particular means of payment is used for certain streets. The means of payment is wholly within the discretionary power of the city's law making body. It cannot legislate so as to deprive itself or future councils of the corporate authority granted by the legislature to enact measures for the benefit of the municipality, the levying of taxes, or the improvement of other streets as their judgment dictates. The authority is exhausted as council legislates for and improves designated streets. Over those not improved as permanent highways, the control of council is complete. We would not assert that a gross abuse of discretion might not be perpetrated in determining what streets or parts of streets should be paved wholly at the city's expense and what streets should be paved at the expense of the abutting owner. This record does not show any discrimination and if it did and it were of such character that a court could interfere, the complaining parties should have moved to determine that question before the city had caused a large expenditure of money to be made on the faith of the ordinances providing for the improvement. One cannot stand idly by until the streets are paved and then assert that there has been a gross abuse of discretion. A certain amount of discrimination is bound to appear in the determination of all taxing and local improvement problems; and though the city may cause certain streets to be paved entirely at the public expense, and other streets by the foot front rule, and thereby compel the abutting owner to contribute, through taxation, to the payment of the former paving, this circumstance would not amount to such an abuse of discretion as to render the act of council void, nor would the possibility of such contingency arising impale this section of the act on the prohibition contained in Art. 9, Sec. 1, of the constitution; Anderson v. Lower Merion Township, 217 Pa. 369. The reason for this rule is obvious. The location of the population, the use made of the streets, and many other considerations enter into the question of how the payment of the improvement shall be made. This must be determined by the local government and courts should not interfere unless a palpable injustice warranted it. And while the special benefit to the abutting owner may be the limit of the taxing power, in determining his liability as it is affected by the action of the city in paving other streets at the city's sole cost, there is a presumption that in apportioning the cost through a general system of taxation, the complaining owner, in common with all others, derives a benefit. When a street or part thereof is selected to be improved within the discretion of the legislative branch of the city's government, and contribution toward the cost be equally distributed within that street, it meets not only the equities of the case but any constitutional prohibition. The principle contained in White v. Meadvile, 177 Pa. 643, has, therefore, no application.

We are not convinced that this Act of Assembly as a whole is unconstitutional, being in violation of Article 3, which provides that no bill, except general appropriation bills, shall be passed containing more than one subject. We have frequently discussed titles to Acts of Assembly as bearing on this article of the constitution, and need make no extended reference to them.

Section 4 of the Act of 1901, P. L. 364, as amended by Section 2 of the Act of 1903, P. L. 42, requires, where the contractor performing the work is to be paid by assessment bills, the lien to be filed to his use; by Section 9, one month's notice must be given to the owner of the property affected before the claim is filed. Improvement bonds in the usual form were issued, which contained a clause that the "bonds shall rest alone upon and be payable out of said assessments and from no other fund." The contractor accepted these bonds as payment. This lien was filed by the city and no notice of intention to file was given. We do not regard the means of payment as being a mere subterfuge to evade giving notice, nor do we regard the transaction as being equivalent to an equitable assignment of the assessment bills to the contractor. It was, therefore, not necessary to file the claim to the use of

the contractor or to give notice. It is true the improvement bonds were a limited obligation to be paid by the assessment claims. It was, nevertheless, the duty of the city to collect these claims. As between the bondholder and the city, the city's liability would not end if its officers were negligent or careless in their collection, and its responsibility would not cease if there should be a diminution in the amount of those collections, occasioned through the voluntary act of the city. These questions only serve to emphasize the fact that the claims were solely and exclusively within the city's control, and the contractor could exercise no act of ownership over them. The contractor was paid by the bonds, not by the assessment bills; see Gable v. Altoona, 200 Pa. 15; Dime Dep. & Dis. Bank of Scranton v. Scranton, 208 Pa. 383, O'Hara v. Scranton, 205 Pa. 142.

When the cost and expenses are assessed against abutting owners, there must be an equitable reduction for the frontage of lots which, from "their peculiar or pointed shape, an assessment for full frontage would be inequitable;" see Section 10 of the Act of 1913. The ordinances authorizing the improvements need not contain the clause of the Act relating to this question. No uniform rule can be laid down that would apply equitably to all odd-shaped lots. The Act must be followed when the assessment is made, and if it is not complied with, the owner does not lose his right to contest the amount of the assessments. The affidavit of defense nowhere contends that the amount of the lien is unjust by reason of the city's failure to make due allowance for a peculiar shaped lot in accordance with the Act.

The assignments of error are overruled and the judgment is affirmed.

Hoffman Leaf Tobacco Co.'s Appeal.

[HOFFMAN LEAF TOBACCO CO. v. ADAIR ET AL.]

Contract—Partial Acceptance of Goods—Conditional Tender.

Defendant agreed to purchase all the "Ohio warehouse leaves" plaintiff had in stock. Plaintiff shipped three carloads, one of which defendant refused to receive, because it contained also some other tobacco. On the trial of the case the Court below, (WANNER, J.,) charged that "the defendant was not obliged to receive and pay for a car containing tobacco other than" that purchased. HELD, to have been error.

Defendants did not buy by the carload, but by the pound, and could not refuse the whole carload because part of it did not come up to the standard.

Detendant tendered a check for the tobacco accepted, but wrote thereon "in full to date." HELD, that whether the tender was sufficient to free the defendant from interest depended upon whether it was for all that was due.

Appeal from the Court of Common Pleas of York County.

The facts of the case are given in the Court's opinion.

The opinion of the Court below, WANNER, P. J., was as follows:

The usual general reasons that the verdict was against the evidence and that the Court erred in its answers to points, were originally filed in this case, with leave to file more specific reasons after the stenographer's transcript should be filed.

Those additional and more specific reasons refer to designated portions of the evidence alleged to have been erroneously ruled upon by the Court, and to several extracts from the Court's general charge. We have examined the references to the testimony in the transcript as to which the Court's rulings are excepted to, and have found no such error in any instance as could have affected the verdict of the jury, or as would in any view of the case, entitle plaintiff to a new trial.

The rulings in most instances were so obviously based on well settled general principles that they require no citation of authorities to sustain them.

The exceptions to the Court's instructions on the sufficiency of the defendants' tender of a check in payment of the amount due, is perhaps not material now, in view of the general verdict rendered by the jury for defendant. The authorities, however, bear out the instructions of the Court that where the objection is not made to the offer of a check instead of money, but only to the amount of the check, that the tender is good and sufficient, if the amount of the check really covered the whole indebtednesss at the time; Pershing v. Fernberg, 203 Pa. 144. See also cases cited in 28 Cyc. 147.

This case was submitted without oral argument, and we find no authorities in the briefs of counsel showing any error in the Court's answers to points submitted, or in its general charge.

The motions for a new trial and for judgment *non obstante veredicto* in favor of the

plaintiff in this case, are both refused and overruled.

From the judgment there entered this appeal was taken.

Cochran, Williams & Kain for appellant.

Niles & Neff and *A. W. Herrman* for appellee.

July 13, 1917. WILLIAMS, J.—This was an action of assumpsit to recover the sale price of tobacco furnished to defendants by plaintiff.

Plaintiff's agent testified that on November 29, 1912, defendants agreed to purchase all the "Ohio low grades" plaintiff had in stock at four cents a pound. Plaintiff confirmed the alleged order as follows: "We duly received your order through our Mr. Roath for all our Ohio warehouse leaves at 4 cents a ct.wt. net cash f.o.b. Ohio to be shipped at once. Same was accepted and the tobacco ordered shipped." Plaintiff shipped two carloads of what he called "Ohio low grade" from Ohio, and one car from Indiana. Defendants accepted the two from Ohio but refused the one from Indiana, claiming that it was not what they had agreed to purchase. They paid $76.75 freight on the car refused. Plaintiff would not receive the returned car and it does not appear what became of it.

Defendants' witnesses testified that the contract was to purchase all the "Ohio warehouse leaves" plaintiff had, and not all the "Ohio low grades" and that there was a substantial difference between the two; that in the car refused there were approximately thirty cases of "Warehouse leaves" out of sixty cases. According to plaintiff's witness the car contained twenty-seven cases of "leaves" and the balance, other kinds of "Ohio low grades."

At the request of the defendants the court charged, inter alia: "The contract upon which this action is founded is not for the purchase of three carloads of tobacco or for any fixed quantity of tobacco by the defendant from the plaintiff. It was the purchase of all the Ohio Warehouse Leaves which the plaintiff had at the time of the contract. The defendant was not obliged to receive and pay for a car containing tobacco other than Ohio Warehouse Leaves."* Appellant has assigned this as error.

*This constituted defendants' first point.

The jury found a verdict for the defendants upon which judgment was entered and plaintiff appealed.

Both parties agree that the contract was for the purchase of all the "Ohio warehouse leaves" plaintiff had in stock. This being so, the contract was entire as to any warehouse leaves furnished by plaintiff to defendants. They were bound to accept all the Ohio warehouse leaves delivered and the evidence is that they refused to accept at least twenty-seven cases. It was, therefore, error to affirm the defendants' first point without this qualification. This was not cured by leaving the other questions in dispute to the jury. Defendants did not buy by the carload, but by the pound, and could not refuse the whole carload because part of it did not come up to the standard. They were compelled under the admitted contract to accept all the warehouse leaves delivered to them by the seller if they "were merchantable under the denomination affixed"; Jennings v. Gratz, 3 Rawle (*168) 167. As Coulter, J., said in Fraley v. Bispham, 10 Pa. 320, 325: "The sale by bill of parcels, with which perhaps the sample corresponded, was of sweet-scented Kentucky leaf tobacco. It is not pretended that the article delivered was not tobacco, nor that it was anything else than Kentucky leaf tobacco. It was in specie Kentucky leaf tobacco, in kind the same as the article sold. * * * And in such cases * * * there being neither express warranty nor imputed fraud, the risk falls on the buyer."

Defendants, in their affidavit, admit liability for $1,196.56, the value of the two cars accepted, less $76.75, freight charges paid on the car refused; and paid to plaintiff by stipulation $1,419.81, plus costs $14.75, which did not include interest on the amount admitted to be due, nor the item of freight charges claimed as a setoff. This was done with leave to plaintiff to proceed for the remainder of his claim, viz: the item not covered by the payment and the price of the tobacco refused.

Defendants, before suit, sent a check to plaintiff in payment for the tobacco accepted, containing the statement, "in full to date." This plaintiff refused because it was not "in full to date." The court below charged that this was a sufficient tender to free the defendants from liability for interest on the

part admitted by the affidavit to be due.† This was also assigned as error.

The annexing of a condition without right to an offer of payment will prevent it from being a valid tender; Forest Oil Co.'s Appeal, 118 Pa. 138, 145. See also Pershing v. Fernberg, 203 Pa. 144. Whether the tender was sufficient would depend largely upon whether it was all that was due, and this, with the claim for freight, must await a retrial of the case.

The judgment is reversed and a *venire facias de novo* awarded.

Holtzapple's Appeal.

[CITY OF YORK v. HOLTZAPPLE.]

Municipal Lien—Paving—Macadamizing.

Appellee (plaintiff below) on the trial of a sci. fa. sur municipal lien offered the lien in evidence and then rested. Appellant (defendant below) proved that years before plaintiff had macadamized said street from curb to curb at its own cost, and had kept the street in repair ever since. The court below, ROSS, J., gave binding instructions for the plaintiff. HELD, that the judgment must be affirmed.

Defendant offered to prove by the testimony of the street commissioner that he was acquainted with the methods employed by plaintiff city in changing an ordinary dirt street to a permanent street, which offer was rejected by the court. HELD, not to be error.

The "change" called for is expressive of the municipal intention and such intention must be established by evidence apart from the work done.

Defendant offered an ordinance of plaintiff city regarding digging of ditches in macadamized streets, to show intent. The offer was rejected. HELD, not to be error.

The ordinance was too remote from the time when the work was done to be any evidence of intention as applied to this particular street.

Defendant offered the report of the borough engineer, showing what streets had been "paved with macadam," which offer was rejected. HELD, not to be error.

The report of the borough engineer was not approved by council. It would not have been evidence of municipal intention if it had been, as there is nothing to show that council knew what sort of construction was embodied under the term "macadam."

The Act of 1901 does not require the lien to set out at length the Acts and ordinances under which the work was done.

If the authority to do the work does not exist, it must be set up in the affidavit of defense or questioned in other appropriate remedies.

Eyster's Appeal, 31 YORK LEGAL RECORD 45, followed.

No. 27 March Term, 1917.

Appeal from the judgment of the Court of Common Pleas of York County, Pa.

For the opinion of the court below, ROSS, J., on a motion to strike off the municipal lien, see City of York v. Holtzapple, 29 YORK LEGAL RECORD 134.

At the trial of the case, the court gave binding instructions for the plaintiff. A motion for judgment for the defendant *n. o. v.* was overruled; City of York v. Holtzapple, 30 YORK LEGAL RECORD 173.

From the judgment there entered this appeal was taken.

James G. Glessner and *Cochran, Williams & Kain* for appellant.

John L. Rouse and *Niles & Neff* for appellee.

July 13, 1917. KEPHART, J.—We have frequently stated the rule that will relieve abutting property owners from liability for subsequent street improvements. It is unnecessary to repeat it; Philadelphia v. Kerchner, 62 Pa. Superior Ct. 565; Pottsville v. Jones, 63 Pa. Superior Ct. 180; Easton City v. Hughes, not yet reported. The work claimed as an original paving was done in 1874, under the authority of council. It consisted of spreading limestone ballast evenly over the roadway, converted into a hard surface by the passing traffic, and kept in repair by placing loose stones in the holes or ruts. Without other evidences of intention, this would not be such paving as would exempt the abutting owner from liability for future improvements; Harrisburg v. Funk, 300 Pa. 348. Evidence of

† "As to the tender, which has been testified to we instruct you that, in form the tender as made, was sufficient. The check of the defendant was only refused because it was insufficient in amount, to cover the whole of the plaintiff's claim. The check cannot, therefore, be rejected as a tender, unless it was not for the money then due in full. On the witness stand the plaintiff said he would have accepted the check, if it had been large enough to cover his claim. He did not object to the check not being good, but to it not being sufficient in amount. So we say to you, that if the defendant's check and the money already paid by him at the time when the check was tendered, was sufficient to cover everything due to the plaintiff, including interest, then the plaintiff can recover no more."

the same character of work done on other streets would not supply such intention. Indeed it could scarcely be considered as being more than repairs done to an ordinary dirt road, where the traffic is heavy. "While due effect must be given to the character of the work done in determining municipal intention, when that work is macadamizing, without other ample evidence, it will not be sufficient to show municipal intention. There must be additional evidence of this fact;" Easton City v. Hughes, supra.

Describing the work as macadam by witnesses or in reports, furnishes no information as to the manner of construction and the materials entering into its construction. A witness cannot testify that certain methods of construction were employed to change an ordinary dirt street to a permanently improved highway. This calls for a conclusion. The "change" called for is expressive of the municipal intention and such intention must be established by evidence apart from the work done. The testimony of Heltzel and others was therefore properly rejected.

We said in Pottsville v. Jones, supra, that rules and ordinances of council might properly be considered. If the ordinance of 1906 intended to and did embrace the construction done in 1874, it might have been proper evidence, but there was no evidence of this fact. There is nothing in the ordinance which indicates such intention. The court was correct in holding from the evidence that the ordinance was too remote from the time when the work was done to be any evidence of intention as applied to this particular street. If we regard the experimental work done in 1903 as being macadam, this ordinance alone would not be sufficient evidence to establish municipal intention. Especially is this true when the work of 1903 was done by the highway committee under an ordinance approved in 1889, which provides: "Said committee * * * shall have general charge of, care and oversight of the ordinary repairs of all streets, alleys, highways, water courses * * * pavings, gutters * * * of the city, and shall enter into contracts for labor and material necessary for the same." It was clearly the intention of this ordinance that if this committee wanted to make any permanent improvement it must go back to council for authority. To have ratified this work as a permanent improvement in the face of this ordinance required some act on the part of council clearly expressive of an intention to adopt it as such.

The report of the borough engineer was not approved by council. It would not have been evidence of municipal intention if it had been, as there is nothing to show that council knew what sort of construction was embodied under the term "macadam." This report was made in 1893–twenty-three years after the work here claimed as a permanent improvement was done. The ordinance of 1900 was a mere police regulation affecting all highways without regard to the character of streets. Considering the report of the engineer, the ordinance of 1906, and the testimony as to the manner in which other highways have been constructed, these offers, with the other evidence, would fall far short of showing an intentention to adopt the construction of 1874 as a permanent improvement. It was the duty of the court to determine the sufficiency of the evidence as showing municipal intention (Pottsville v. Jones, supra), and in so doing we can find no error in its determination of that question.

The city offered the lien as *prima facie* evidence under the Act. None of its terms were denied. The fourth paragraph recited the Acts and ordinances under which the work was done, and the lien filed. These ordinances provided for the payment of the cost of the improvement. It is urged that the city should have offered the ordinances in evidence. The affidavit of defense did not deny that such ordinances imposed the cost on the abutting owners. The Act of 1901 does not require the lien to set out at length the Acts and ordinances under which the work was done. If the lien refers to such authority by recital of title, that is sufficiently descriptive to enable the defendant to know what laws and ordinances are claimed an authority, it will be a compliance with section 11 of the Act of 1901. If the authority does not exist, it must be set up in the affidavit of defense or questioned in other appropriate remedies. No challenge is made as to such authority by the affidavit, and under the 20th section of the Act of 1901, the lien is conclusive evidence of the allegations therein contained.

We have discussed, in City of York v. Eyster, other questions raised in this appeal.* We need not repeat what was there said.

The assignments of error are overruled and the judgment is affirmed.

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* *Supra*, 45.

Fetrow's Estate. No. 3.

Legacy—Vested or Contingent - Charge on Land—Valuation.

Testator devised a tract of land to F for life and to "his children in equal shares, with this provision that they pay unto the other devisees named in this my last will, one-third of the valuation of said tract of land. In case the said Michael Fetrow shall have no children at his death then the said tract of land shall be sold and the proceeds thereof divided among the surviving devisees, named in this will in equal shares." Part of this tract was taken by a railroad company in condemnation proceedings, and after the death of the life tenant the fund came into court for distribution. The auditor distributed one-third of it among the next of kin, legatees and personal representatives of "the other devisees" named in the will, which report was confirmed by the court below, WANNER, P. J. HELD, that the decree must be affirmed.

The clause "with this provision that they pay unto the other devisees named" in the will, was a condition imposed upon the passing of the fee and chargeable upon the land.

If it appear from the language of the will that the testator intended to couple the payment of the legacy by the devisee with the devise of the land, so that payment is to be made because or as a condition on which the devise has been made, then the real estate is in equity chareable with the payment of the legacy.

If the devise of the land, upon which the legacy is charged, becomes vested either in possession or in interest immediately upon the death of the testator, and by the terms of the will is given subject to the payment of the legacy, the legacy must be considered likewise vested; and if the legatee should die before it becomes payable it will pass to his or her representatives; because in such case it is plain, from the terms of the will, that the legatee was as much the object of the testator's bounty as the devisee, and that the testator intended that the latter should take the land *cum onere.*

The value of the charge on one-third of the land devised was to be determined at the time when it was to be paid.

The devisees, although receiving the fee, could not enjoy the use of it until the death of the life tenant and then when they entered into the enjoyment of the estate, the means of paying the legacy became theirs.

Appeal from the decree of the Orphans' Court of York County, Pa.

This is believed to be the final conclusion of the litigation arising over the will of Joshua Fetrow, who died February 25, 1864.

The first contention is reported in Fetrow's Estate, 50 Pa. 253, and was soon followed by Fetrow's Estate, 58 Pa. 424.

The next litigation arose after the death of Lucinda Rutter (*nee* Dietz), a life tenant, and is reported in Fetrow's Estate, 30 YORK LEGAL RECORD 191, and affirmed in Fetrow's Estate, No. 2, *supra* 39.

The fund for distribution in this estate arose after the death of Michael Fetrow, another life tenant, and accrued from the taking, in condemnation proceedings, of a portion of the land devised to him for life. The auditor awarded two-thirds of it to the remaindermen, children and heirs of Michael Fetrow, and one-third to the representatives and next of kin of all the other devisees named in the will of Joshua Fetrow. Exceptions to his findings were filed by the heirs of Michael Fetrow, who claimed that the original devisees being all dead at the time of Michael Fetrow's decease, the legacy sinks into the devise of the land, and the devisees of the land take the same free from any charge thereon.

The court below, WANNER, P. J., dismissed the exceptions and confirmed the report. From that decree this appeal was taken.

Jacob E. Weaver and *D. H. Yost* for appellants.

Cochran, Williams & Kain, E. Philip Stair and *D. P. Klinedinst* for appelles.

July 13, 1917. TREXLER, J.—We are asked to construe the following clause of the will of Joshua Fetrow. "I give, devise and bequeath unto Michael Fetrow, son of Henry Fetrow now living with me during his natural life a tract of land (description). He the said Michael Fetrow to have and hold the same and keep said land and fences in order during his natural life, at his death, I give and devise the same unto his children in equal shares, with this provision that they pay unto the other devisees named in this my last will, one-third of the valuation of said tract of land. In case the said Michael Fetrow shall have no children at his death then the said tract of land shall be sold and the proceeds thereof divided among the surviving devisees, named in this will in equal shares."

There are three questions presented.

1. Is the legacy of "one-third of the valuation of said tract of land" a charge upon the real estate?

It has been held that a mere direction to the devisee to pay is not sufficient to show such intention; Buchannan's Appeal, 72 Pa, 448. If the intention appears by a natural and obvious implication from the words

used, this is sufficient. Where the devise is coupled with the payment of the legacy as a condition annexed, then the land is charged with the payment. The words in the clause we are construing are, "with this provision that they shall pay." We have a number of cases which have construed the word "provided" or its equivalent as making a charge upon land: thus "provided he pay"; Holliday v. Summerville, 3 P. & W. 533; "provided however that he shall pay for"; Downer v. Downer, 9 Watts 60; "provided that he the said * * * shall pay"; Pryer v. Mark 129 Pa. 529; "upon the following conditions nevertheless that the said * * * pay"; Walter's Estate, 197 Pa. 555; "on condition he pay" Moran's Est. 13 Pa. Superior Court 251. All these expressions are held to couple the legacy with the devise of the land and show an intention to make the payment of the legacy a condition of the devise. The life tenant had his estate free of any burden. At his death it passed to those who were required to pay one-third of the valuation. This time of payment might have been near or remote depending upon the duration of the life of the life tenant and we do not think it within reason to suppose that the testator's mind was directed to any person who was to be personally liable for this but that it was a condition imposed upon the passing of the fee and chargable upon the land. We, therefore, conclude that this one-third of the valuation was a charge upon the land payable at the death of Michael Fetrow.

We may say, in passing, that the word "devisees" has no limited meaning. It was held in Fetrow's Estate, 58 Pa. 424, by the Supreme Court in construing the same will, that the word was not restricted to those to whom the real estate was given, but included all the beneficiaries.

2. Is the legacy vested or contingent?

As to the estate of Michael Fetrow's children, it vested at testator's death, Michael having one son, Eli, at that time. Where there is a devise of a life estate followed by a remainder to the children of the life tenant, the estate vests at once upon the birth of each child, subject to open and let in afterborn children and this without regard to the question of whether or not the child survives the life tenant; Edward's Est., 255 Pa. 358; Carstenses's Est. 196 Pa. 325; Rau's Est. 254 Pa. 464; Bair's Est. 255 Pa. 169, and cases there cited. See also Fetrow's Est. supra., in which another clause of Michael Fetrow's will was construed, wherein, as in the one before us, there was a subsequent limitation in case there should be a failure of issue.

The children of Michael having the fee, what is the nature of the charge created by the provision above quoted? Did the legacy of one-third of the valuation vest at testator's death, so as to carry it to the children's children or to such others as succeeded to their rights, or, all the devisees who were in being at Michael Fetrow's death having died before the life tenant, did the legacy lapse because there was no one who could bring himself under the description at the time of payment in order to take the benefit of the gift? Was the legacy contingent upon the legatee being in existence at the time of payment? No gift of an interest to the "other devisees" is found in any other clause of the will, and the gift is implied only from the direction to pay. If we were to stop here, we would be compelled to hold that the legacy was contingent, for it has been repeatedly held "that where there is no separate and antecedent gift which is independent of the direction and the time for payment, the legacy is contingent; and it seems to be as well founded in reason as rules of interpretation usually are. Where a gift is only implied from a direction to pay, it is necessarily inseparable from the direction, and must partake of its quality, insomuch that if the one is future and contingent; so must the other be;" Gibson, C. J., in Moore v. Smith, 9 Watts 403. "The rule is conceded that where there is a bequest in the form of a direction to pay, or pay and divide 'from and after' the happening of any event 'then the gift being to persons answering a particular description; if a party cannot bring himself within it he is not entitled to take the benefit of the gift"; Rosengarten v. Ashton, 228 Pa. 389 (394).

We think that the present case is outside the general rule. If it appear from the language of the will that the testator intended to couple the payment of the legacy by the devisee with the devise of the land, so that payment is to be made because or as a condition on which the devise has been made, then the real estate is in equity chargeable with the payment of the legacy. In such a case the payment of the legacy is a condition on which an unencumbered title vests in the devisee; Moran's Est., 13 Pa. Sup. Ct. 251 (265); Gumaer's Est., 19 Pa. Sup. Ct. 261. "If, however, the devise of

the land, upon which the legacy is charged, becomes vested either in possession or in interest immediately upon the death of the testator, and by the terms of the will is given subject to the payment of the legacy, the legacy must be considered likewise vested; and if the legatee should die before it becomes payable it will pass to his or her representatives; because in such case it is plain, from the terms of the will, that the legatee was as much the object of the testator's bounty as the devisee, and that the testator intended that the latter should take the land *cum onere"*; Hodgson v. Gemmil, 5 Rawle 99. Furthermore, the postponment of the payment of the legacy charged was not with reference to the circumstances of the legatees, as in Weaver's Est., 39 Pa. Sup. Ct. 419, but evidently only to let in the life estate of Michael Fetrow. "There is no gift in these cases except in the direction to pay, or in the direction to pay and divide. But if upon the whole will, it appears that the future gift is only postponed to let in some other interest, or, as the court has commonly expressed it, for the greater convenience of the estate, the reasoning has never been applied in this case"; Man's Est. 160 Pa. 609 (612-613); Rosengarten v. Ashton, 228 Pa. 389 (396); Engle's Est. 167 Pa. 463; Moran's Est. 13 Pa. Sup. Ct. 251. The postponment of payment is the result of testator's desire to give Michael Fetrow an unencumbered life estate in the land on which the legacy is charged and his purpose was to make the devisees in remainder not liable for the legacy until they had the means of paying it. The postponement was for the "ease and advantage" of the devisees of the land; Donner's Appeal 2 W. & S. 372; Weaver's Est. 39 Pa. Sup. Ct. 419. We think the legacy was vested.

3. When was the one-third valuation to be fixed, at testator's death or on the death of the life tenant? The more natural view to take of the matter was that the value of the one-third was to be determined at the time when it was to be paid. No useful purpose could have been served by fixing its value as of the time when the testator died. The devisees, although receiving the fee, could not enjoy the use of it until the death of the life tenant and then when they entered into the enjoyment of the estate, the means of paying the legacy became theirs. We think it is reasonable to believe that it was the intention of the testator that the fixing of the amount would take place at the same time.

This disposes of all the questions raised by the Appellants.

The decree is affirmed.

Troup's Appeal

Justice of the Peace—Appeals—Laches.

After hearing the evidence, the Justice of the Peace, according to defendant's witnesses, said he would inform the parties when he rendered his judgment; the plaintiff's witnesses testified that the Justice said he would render his opinion on a fixed day. Judgment was duly given on that day, the defendant being absent. The defendant presented his petition six months later, asking for a rule to file an appeal *nunc pro tunc*; but the Court below, Ross, J., refused the appeal. HELD, that the judgment must be affirmed.

No. 17 August Term, 1915.

Appeal from the judgment of the Court of Common Pleas of York County.

The law and facts are given in the opinion of the Court below, Ross, J., in Ruby v. Troup, 29 YORK LEGAL RECORD 169.

From the judgment there entered this appeal was taken.

John A. Hoober for appellant.

Jas. G. Glessner for appellee.

July 13, 1917. PER CURIAM.—The only error assigned is that the Court below refused to allow the defendant to enter an appeal *nunc pro tunc*, taken from a judgment of a Justice of the Peace, for the reason that he had not received notice of the entry thereof. The opinion filed by the Court in discharging the rule, so fully and clearly answers the appellant's contention that it is not necessary to add anything thereto.

For the reasons given therein the judgment is affirmed.

PUBLIC SERVICE COMMISSION.

City of York et al. v. York Water Co.

Water Company — Reasonable Charge — Meters.

A charge of four cents per cubic yard of concrete used in the mixing of concrete for the purpose of street paving is an adequate price, the testimony disclosing that from thirty-five to forty-five gallons of water was sufficient to mix one cubic yard of concrete.

Where but two, out of the more than 11,000 consumers, request the installation of meters, and where it appears that the charge is based upon the number of the water connections or outlets, for which the consumers are entitled to an unlimited supply, and where it appears that such charge is legal and not excessive and in accordance with the charter powers of the company, the Commission will make no order compelling the water company to install meters in all the homes, thereby entailing a needless expense upon the company, a necessary increase in rates and possible unjust discrimination.

Where no evidence of any kind or character was ever presented in relation to the value of the company's plant, the cost of management, the nature of its resources, the rate of return upon its investment, or any proof that any dividend declared upon its stock was unfair or excessive, and where there is nothing in the case which would warrant any interference with the rates filed by the company, the complaint as to their unjustness will be dismissed.

Petition.

The plaintiff city passed an ordinance requiring defendant company, upon request of any consumer, to install water meters and fixing a penalty of five dollars a day for refusal so to do. The company filed a bill in equity, asking for an injunction to restrain the city from enforcing the ordinance, which injunction was granted; York Water Company v. City of York, 28 YORK LEGAL RECORD 193.

The city appealed, but the Supreme Court affirmed the judgment; City of York's Appeal; 29 YORK LEGAL RECORD 13.

In accordance with the opinions of the courts, the city filed its petition before the Public Service Commission.

John L. Rouse and *W. F. Bay Stewart* for petition.

C. LaRue Munson, Richard E. Cochran and *George Hay Kain*, contra.

May 15, 1917. RYAN, Commissioner.— On August 24, 1915, the City of York, J. F. Klinedinst and C. H. Thomas filed their petition against the York Water Company.

It is therein set forth that J. F. Klinedinst is a practicing physician and is the owner of certain properties in the City of York. No. 220 South George Street is a three-story building, the first floor of which is sub-divided into two offices, one occupied by him and the other by Dr. A. B. Shatto. On the second floor is an apartment occupied by two adults and on the third floor a similar apartment similarly occupied. Each of the ground floor offices has a wash-basin with hot and cold faucets attached thereto. The charge for each of these offices is four dollars ($4.00) per year and the charge for each of the apartments, each of them having hot and cold water spigots at the kitchen sink, one bath tub with hot and cold water spigots, one wash-basin with hot and cold water spigots, and one water closet with flush, is fifteen dollars ($15.00) per annum, or a total of thirty-eight dollars ($38 00) for the entire building for an unlimited supply of water. Dr. Klinedinst is also the owner of No. 836 South George Street, in which the following water fixtures are installed: One bath tub with hot and cold water spigots, two wash-basins with hot and cold water spigots, three water closets, two kitchen sinks with hot and cold water spigots and wash tub in cellar with hot and cold water spigots, a pave wash consisting of threaded pipe with hose connection at the side of the dwelling and also water for steam boiler used in heating the house. The annual charge for an unlimited supply of water to this house with all the foregoing connections and occupied by seven people, is twenty-nine dollars ($29.00).

C. H. Thomas, the other individual complainant, owns No. 636 Linden Avenue. The fixtures therein are as follows: Hot and cold water spigots in kitchen, hot and cold water spigots in bath tub and wash-stand, one water closet, one pave wash with threaded hose connection. This house is occupied by four persons and the charge for an unlimited supply of water is twenty-two dollars ($22.00) yer year. Mr. Thomas also owns No. 117 North George Street, which is also leased to a tenant. The fixtures therein are as follows: Hot and cold water spigots in kitchen, cold water spigots in pantry sink, one hose connection, one bath tub with hot and cold water spigots, one water closet, one wash-stand with hot and

cold water spigots attached, one bath tub with hot and cold water spigots attached, one pave wash with threaded hose connection. The total charge, including an extra fifty cents (50c.) "for a pony kept in the stable," is twenty-six dollars ($26.00) a year. Mr. Thomas also owns No. 46 South Richland Avenue, which he occupies. Therein are hot and cold water spigots in kitchen, hot and cold water spigots in bath tub, two water closets, three wash-stands with hot and cold water spigots, three wash tubs with hot and cold water spigots, two pave washes and one lawn sprinkler and for an unlimited supply of water therefor he pays thirty-one dollars ($31.00) per year.

The petitioners aver that these rates are unjust, unreasonable, excessive and exorbitant and are fixed by the respondent "according to the number of spigots in use and without regard to the probable quantity of water consumed," and that in establishing and collecting these rates the respondent violates the obligation of its charter, to-wit, the Act of February 8, 1916, P. L. 42, and its supplement of April 11, 1870. P. L. 300, wherein said company is required to charge "such reasonable compensation as shall from time to time be agreed on between the company and such individuals according to uniform rates which the president and managers shall hereafter adopt, having regard to the probable quantity of water which applicants are likely to consume."

Complainants further aver that the entire schedule of rates filed with this Commission by the respondent "is unjust, unreasonable, excessive and exorbitant;" that the said rates "are discriminatory in that as to certain classes of customers said respondent charges and collects rates based solely upon the quantity of water consumed, which classes said company supplied with a meter; whereas to the petitioners and others similarly situated whom said respondent refuses to furnish meters, much higher rates are charged and collected than from those consumers who obtain water through meters."

It is further averred that "the rate charged by the respondent for water used in the making of concrete for paving purposes was excessive, unjust and unreasonable."

It is further averred that the rates collected by respondent are "remunerative to a degree largely in excess of the amount necessary to pay the operating expenses of said company, its fixed charges, repairs, depreciation and a reasonable return to its stockholders on the amount of capital actually invested whereby a hardship and injustice is worked against the consumers and patrons of said company."

The prayers of the petitioners are:

"First: That the respondents be required to furnish and install meters in their respective properties and for all other consumers who may in writing demand them to the end that said respondent may charge and collect only such rates as are reasonable, and based upon the quantity of water consumed; Second: That as to all consumers who do not request the installation of meters, the rates now charged and collected be reduced to such an amount as may be just and reasonable."

ANSWER.

The answer of the respondent avers that it was "incorporated under the provisions of 'An Act authorizing the Governor to incorporate the York Water Company' approved February 8, 1816, and divers acts supplementary thereto and amendatory thereof and by proper proceedings had in the year 1896 it accepted the provisions of the present Constitution of Pennsylvania and of 'An Act to provide for the incorporation and regulation of certain corporations' approved the 29th day of April, 1874, and filed a certificate of such acceptance in the office of the Secretary of the Commonwealth. Immediately after the approval of said Act of February 8, 1816, the respondent was incorporated and organized and constructed its water works and continuously since the completion thereof has been and now is engaged in supplying water to the public * * * ; that the rates for service are just and reasonable and in accordance with the schedule filed with this Commission; that the classifications of its patrons are suitable and reasonable; and as to the complaint of the City of York as to the sum charged for the water used for concrete paving it is averred that 'not only did the City of York have knowledge and notice of said tariff and schedule of rates and of the rate named therein for water for concrete work, through the posting and publishing of said tariff and schedule of rates as required by law, but was given direct notice by the respondent that it would be required to pay for the water used in this specific instance, whereupon the said City in writing agreed to pay the petitioner for the water used for said concrete work

according to the said tariff and schedule of rates of the respondent.'"

The respondent also avers that free service is rendered to the City of York for all the water that may be used by the three hundred and seventeen fire hydrants; that no charge whatsoever is made for the water supplied to the city hall, fire engine houses, drinking and ornamental fountains, and for flushing the streets of the city, and that "it also furnishes free of charge" two million gallons of water per annum to the public parks.

Averment is further made by the respondent that its "water service is divided generally into two classes, viz, that charged by 'meter rates' and that charged by 'flat rates;' the former being confined to manufacturers, public buildings, mercantile purposes and other large consumers; being chiefly for business purposes but in no manner extending to the service referred to in the petition in this matter; * * * that the rates charged against the petitioners * * * are under the division of flat rates known as 'Domestic (annual rates);' flat rates for domestic service having been charged by the respondent since its organization * * *;" that "these flat rates are strictly in accordance with the obligations of the charter of the respondent in that they have 'regard to the probable quantity of water which applicants are likely to consume,'" and "that to depart from the long established custom of the respondent in serving its domestic customers with water under flat rates, whereby the consumer would no longer enjoy the unlimited use of water, would be detrimental to the interests and health of the consumer and to the inhabitants of the territory served by respondent."

To the answer of the water company, the complainants filed their replication and issue was thereupon joined.

SUMMARY OF EVIDENCE.

At the first meeting for the purpose of taking testimony, counsel for the complainants declared: "There are two questions involved in this inquiry. One is the refusal of the York Water Company to install meters for determining the quantity of water consumed by the consumers and which we say is a violation of their charter duty. The other question is a question as to whether or not the York Water Company is not reaping a greater reward for the amount of its investment than it is entitled to. In other words, that its charges generally are excessive. As to the first of these two propositions we are ready to go on. As to the second we are not, for this reason: We gave notice to the York Water Company to produce certain books and papers bearing upon its capitalization, expenditures, property and so forth; they declined to furnish that information. We are still without it and we are here now asking for a subpoena *duces tecum* to require them to produce these books and papers. On that branch of the case we are not prepared." The hearing was proceeded with and from the statement of counsel and evidence presented then and at subsequent meetings the following facts appear:

1. The York Water Company was organized in 1816, from which time it has been serving the people resident within the City of York.

2. Its charter provides, *inter alia:* "That the said president and managers shall, in such streets or parts of the borough where pipes shall be required, erect hydrants to be used solely for extinguishing fires; and they shall have liberty at all times, where the trunks shall be laid in and through any of the streets and alleys in said borough, to suffer individuals to be supplied with water for domestic or manufacturing use for such reasonable compensation as shall from time to time be agreed on by the company and such individuals, according to certain uniform rates which the president and managers shall hereafter adopt, having regard to the probable quantity of water which applicants are likely to consume."

3. During all the period since its incorporation the respondent has supplied its domestic consumers by the flat rate system—that is, making a charge based upon the number of water outlets or connections in each building.

4. That the tariff or schedule filed with the Commission prior to January 1, 1914, and now operative contains substantially the rates in force since 1906, and that under them all consumers are divided into two classes: (A), Those on meter rates, such as business, industrial and manufacturing; (B), Those upon flat rates, which include all domestic consumers.

5. The total number of customers of the respondent company is 11,397, of whom only 342 come under the division receiving measured service. Of the 11,055 who are charged flat rates, 5,701 pay five dollars

($5.00) or less for an unlimited service; 3,812 of them pay between five dollars ($5.00) and fifteen dollars ($15.00) for unlimited service; 1,266 of them pay between fifteen dollars ($15.00) and twenty-two dollars ($22.00) for unlimited service, and 276 pay various sums from nine dollars ($9.00) to eighty-six dollars fifty cents ($86.50), one paying the latter amount.

6. The 342 users upon metered service paid during the year 1915 various sums, the lowest being two dollars eighty-nine cents ($2.89), and the highest five thousand nine hundred eighty-one dollars seventy cents ($5,981.70).

7. In the summer of 1914 the City of York laid 10,031 cubic yards of concrete pavement, and for the water used in this work the York Water Company charged nine hundred two dollars and sixty-two cents ($902.62), or at the rate of nine cents (9c.) per cubic yard. With knowledge of the charge, the city agreed to make payment therefor, but it has refused so to do, and declares the charge to be "unjust, unreasonable and grossly disproportionate." On behalf of the city evidence was presented that in the doing of similar work at a subsequent time there was only used an average of thirty-five gallons for each cubic yard of concrete paving laid and that at the highest price asked by the water company from any of its metered industrial customers the charge should be at the rate of two cents (2c.) per cubic yard. The testimony of the experts called on behalf of the city showed that there was no uniformity of price for this character of service throughout Pennsylvania, the charge varying from two cents (2c.) per cubic yard in Harrisburg to an amount greater than that charged in York. On behalf of the company it was testified that the charge in Altoona was ten cents (10c.) per cubic yard, in Bradford eight cents (8c.), Charleroi ten cents (10c.), Greensburg from six cents (6c.) to fifteen cents (15c.), Huntingdon ten cents (10c.), Steelton twelve cents (12c.), Wilkinsburg six cents (6c.); although it was also admitted that in many portions of the state the charge was as low as Harrisburg's and ranged generally from two cents (2c.) to nine cents (9c.), the sum in dispute.

8. No testimony was presented relating to the financial condition of the company, the value of its plant or that the charges made by it to its domestic consumers are in any wise unjust, unreasonable, or excessive. Since the first meeting references have been made to the charges collected by the respondent and an attempt was made by the issuance of a subpoena to compel the production of books, papers and reports of the company running back to the year 1880. The company offered to permit an investigation by a public accountant of all its affairs but the offer was never accepted so far as the record discloses, and no inquiry was made in relation thereto nor has any evidence been presented of the receipts or expenditures of the company nor any proof whatsoever presented that any return the company may enjoy is excessive.

QUESTIONS TO BE DECIDED.

Three questions are presented to the Commission.

First.

As to the charge for the water used in the mixing of concrete used in street paving.

The city has never paid the bill presented by the water company, and there is therefore no demand for an order of reparation. There has been no attempt by the water company to refuse a continuance of its supply to the city because of the non-failure to pay. It is doubtful whether the subject could come before this Commission for adjudication but, by assent of the parties and because of their desire that we should fix a fair amount, consideration is given to it. The company seeks to justify the charge by the agreement of the city to pay the sum; by the payment hitherto of like amounts; by comparison with the charges in other cities; by the needs for inspection; and by the great waste which the company claims follows the use of a hose in the mixing of concrete in the public streets. As hereinbefore stated the testimony shows wide variance in the charges in different sections of Pennsylvania, but with ordinary care thirty-five to forty-five gallons of water to one cubic yard of paving seems to be the amont required. Giving due consideration to the probability that waste is considerable we think that the sum of four cents (4c.) per cubic yard would be adequate, and in accordance with the suggestion made that we fix a fair price for water so used by the City of York, we name four cents (4c.) per cubic yard as the

price that should be paid for that which is now in dispute and for that which may hereafter be used.

Second.

As to the installation of meters for domestic consumers.

Out of the more than 11,000 customers of the York Water Company but two appear as complainants, and it is in evidence that during ten years not more than fourteen persons have ever requested the installation of meters.

The complainants declare that the small number making demand is accounted for by the fact that the City of York through its lawfully constituted authorities expressed the wish of the people for metered service in passing an ordinance on February 27, 1914, under the provisions of which the water company was required to install and maintain at its expense meters for all customers so requesting whose annual charges exceeded five dollars. The enforcement of this ordinance was restrained by the Supreme Court on May 26, 1915, see York Water Co. v. City of York, 250 Pa. 115,* it therein being held: "The Public Service Company Law was intended to provide a complete system for the supervision and regulation of public service corporations * * * . The purpose of the ordinance in question here was to prevent what was declared to be the exaction of unjust and exorbitant charges from a certain class of consumers, but this is a subject clearly within the powers of the Public Service Commission * * * . There can be no reasonable doubt that the legislative intention was to make the Public Service Act the supreme law of the State in the regulation and supervision of Public Service Corporations." Following this decision the subject was presented to this Commission.

The actual number of those paying definite sums for the water supplied them has been hereinbefore set forth and in view of the charges made by other water companies in our Commonwealth it cannot be asserted with truth that there is any excessive sum collected or improper amounts demanded from the patrons of the York Water Company. The supply given to them is unlimited. The charge therefor, it is true, is based upon the number of the water connections or outlets—but such method of charge is not uncommon.

The complainants assert that such a basis of computation does not meet the requirements of the charter of the company and that the spigots or outlets charge is not the fixing of a rate "having regard to the probable quantity of water which applicants are likely to consume.' They aver that the use of a meter is the only method by which the "probable quantity of water" can be determined and that these quoted words demand their installation. It is undoubted that when the charter of the York Water Company was granted meters were unknown, so that these devices could not then have been in the legislative mind, and it seems to the Commission that the fixing of a rate for the "probable quantity of water which applicants are likely to consume" can be determined with sufficient accuracy under the century-old methods prevailing in the City of York by the number of spigots in a building.

The words of the charter indicate that the rates should be fixed in advance because it requires that the president and managers shall supply the water for such reasonable compensation as shall from time to time be agreed on, having regard to the probable quantity of water which the applicants are likely to consume. The quantity that applicants are "likely to consume" could only (certainly before the invention of meters) be "likely" told from the facilities that these applicants might provide for their possible use. It is reasonable to assume that the more bath tubs in a house the more likely these are to be used, as neither money would be expended for their costly installation nor room taken up in the building for them, unless they were intended for employment, and it seems to the Commission that there is entire consonance with the letter and spirit of the Act of Assembly giving life to the York Water Company when the company bases its charges for an unlimited supply of water upon the number and character of the fixtures and spigots installed in a dwelling, which fixtures and spigots may be turned on and used at any time. It is undoubtedly in line with the modern trend to require water companies to install meters and make charges for the water actually used. In the case before us, however, the people of York are in the enjoyment of a copious supply of water against which no complaint has been made as to purity or

* City of York's Appeal, 29 YORK LEGAL RECORD 13.

clarity and which they receive in unlimited quantities pumped, piped, stored and filtered, at a charge as low as that enjoyed in probably any community in the state. To compel the water company to put in meters to all their more than 11,000 customers would be to entail needless expense upon the company which would be reflected in increased charges necessarily, and to require them to supply some of their patrons with meters would be to create another class of consumers with the possibility of unjust discrimination. Under existing conditions the people of York are divided into two general classes—(a), the industrial and (b), the domestic. The industrial embraces not only manufacturing establishments but semi- or quasi-public buildings. These latter number but three hundred and forty-two. All of the other 11,055 embracing the domestic service, receive an unlimited supply and we cannot find any reasonable cause in the testimony presented for interfering with the management and operation of the company and ordering a further subdivision of the domestic service into metered and non-metered classes.

Third.

As to the unjust rates.

At the first hearing of this case it was brought to the attention of the Commission that a subpoena *duces tecum* had been served upon the water company calling upon it to produce its books and records covering a period of thirty-five years. To the bringing of its books the company objected, and suggested that in lieu thereof a statement should be given it of the special information required and that such would be furnished. At the second hearing counsel for complainants detailed the efforts made to secure the information required and the answer of the water company giving a partial reply but setting forth that "whenever the Public Service Commission shall decide to go into the question of rates the York Water Company will promptly furnish the remaining information called for * * * ."

Counsel for the complainants then asked that the water company should be compelled to furnish the information, and after discussion by counsel for complainants and respondent, the record discloses the following:

"The Chairman: At the risk of breaking your line of thought, I want to interrupt and ask you if the case has proceeded far enough so that the complainants have made out a *prima facie case*. Have you made out a *prima facie* case?

Judge Stewart: We have, as to three questions.

The Chairman: What three questions?

Judge Stewart: The question of the amount charged for water used in making concrete. * * * We have also established a *prima facie* case with regard to the installation of meters. That is two questions in one, because we contend that it is the duty of the company under its charter to furnish the meters. These two questions we have already covered.

The Chairman: What have you done with respect to rates?

Judge Stewart: We have been trying to get the information called for, but have been unable to get it.

The Chairman: Have you proved any feature of it? Have you put in any evidence, whatever?

Judge Stewart: No.

Commissioner Pennypacker: This information would not throw any light on the question of the propriety of putting in meters.

Judge Stewart: On, no, it is a separate question altogether. It is a question of rate making.

Mr. Munson: May I at this point repeat what I said before, that these gentlemen in order to ascertain the proper rate must of course ascertain what is a proper valuation. Now the books and property of that company are open to their proper inspection. The inspection of a company should be done by a proper accountant. I suggested at the other meeting and I now reiterate that these gentlemen, or the Commission, may name any responsible chartered accountant who will have complete and full access to the books and property of this company—not only complete access but every assistance that we may properly give that chartered accountant will be furnished him * * * .

The chairman: It has not been the policy of the Commission to throw open the books of a utility company generally unless it became evident from the progress of the case that it was necessary to have that evidence to settle the issue involved, but not in the first instance.

Mr. Munson: But I say we consent to it, only we maintain that we should not be put to the expense of it. * * * .

The Chairman: How does the information which you seek aid the Commission in determining the value of this property for rate making purposes?

Judge Stewart: As I stated a moment ago, I do not know that we want to go into that question of valuation. If these gentlemen would furnish the information asked for—

The Chairman: How would that enable you to determine?

Judge Stewart: That will enable us to determine whether we want to thresh out that question * * * .
* * * * * * * * *

Commissioner Pennypacker: What is your objection to accepting the offer of the other side to appoint a suitable expert and examine their books and see whether you have a case?

Judge Stewart: I do not want to go into that question at all. * * * .

Commissioner Pennypacker: And the reason?

Judge Stewart: The reason I stated awhile ago that I do not know that we would pursue this question of excessive rates after we got the information."

The application to compel the company to furnish the information demanded was never granted and no evidence of any kind or character was ever presented in relation to the value of the company's plant, the cost of management, the nature of its resources, the rate of return upon its investment or any proof that any dividend declared upon its stock was unfair or excessive, and there is nothing in the case which would warrant any interference with the rates filed by the company with this Commission and in force between it and its customers.

After a careful examination of all the evidence presented during the year and a half required for the holding of meetings, and giving careful consideration to the arguments of the learned counsel engaged in this cause, we are of the opinion that excepting for the fixing of the rate at four cents (4c) per cubic yard of water used in the mixing of concrete for street paving purposes, the complaint should be dismissed.

This matter being before The Public Service Commission of the Commonwealth of Pennsylvania upon complaint and answer on file, and having been duly heard and submitted by the parties, and the Commission after full investigation having made and filed of record a report containing its findings of fact and conclusions thereon, which report is hereby approved and made a part hereof:

The York Water Company is hereby ordered to file, post and publish an amendment or supplement to its tariffs and schedules of rates, fixing a rate to be charged for water used in the mixing of concrete for street paving purposes of four cents (4c) per cubic yard of concrete so used, said rate of four cents (4c) per cubic yard of concrete so used in street paving to be the legal price that should be paid by the City of York for water so used and which is now in dispute and unpaid; said amendment or supplement to the existing tariffs and schedule of rates to be made effective by the water company on or before June 15th, 1917, upon one day's notice to the public and this Commission; and

It is further ordered that upon compliance with this order by the water company the complaint in this case be, and the same hereby is, dismissed.

Abstracts of Recent Decisions.

(*Cases not otherwise designated are Supreme Court Cases.*)

Non-suit—Statute of Limitations—Substitution of Plaintiff.—Where an accident occurred, and the party injured brought suit for damages, and subsequently died, and an administratrix in another state was substituted as plaintiff on the record, upon the trial of the case it is proper to enter a non-suit on the ground that there is no proper plaintiff of record; but where the foreign administratrix subsequently was appointed administratrix in this county, and applies to the substituted as plaintiff, it is proper to take off the non-suit, and to allow the substitution. As the suit was instituted by the decedent, his right of action is an asset of his estate, and no new party is introduced by the substitution of a proper administratrix, even though more than two years has elapsed since the accident,—*Kelly v. Werner Co.*, (Northampton C. P.) 16 Northampton Co. Reporter 45.

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COMMON PLEAS

C. P. of Alleghany Co.

Hern v. Maeder.

Landlord and Tenant—Trespass—Lowering of Building—Change of Grade—Independent Contractor—Liability of Municipality.

A lessee cannot recover damages from the lessor in an action of trespass for unlawfully entering upon the demised premises and depriving him of the use thereof for a certain period during which the building was being lowered to comply with a new grade established by a city ordinance when the work was under the control of an independent contractor.

A lessor is not liable in damages for inconveniences to his tenants where the inconvenience was caused by the work of a contractor, who employed his own methods and men in lowering a building to comply with a new grade of a city street, when the lessor had no control over the work, and there is no evidence that the lessor knew or might have known, from reasonable inquiry, that his contractor, in doing the work committed to him, would infringe on any of the rights of his tenants.

A municipality is not liable in damages to a lessee in a building lowered to comply with a grade, where the inconvenience and damage complained of was not the change of grade, but the lowering of the building to comply with the grade.

Sur motion of plaintiff for a new trial.

J. D. Hern and *W. H. Lemon* for plaintiff.

Brown, Moore & Monahan for defendant.

May 31, 1917. HAYMAKER, J.—This is an action of trespass to recover damages for unlawfully entering upon the demised premises of the plaintiff and depriving him of the use thereof. At the conclusion of the trial we directed a verdict for the defendant. The plaintiff's brief was not furnished until the present month.

Were we right in thus directing a verdict? A careful reading of the evidence and an examination of the authorities lead us to the conclusion that we were. The plaintiff is a member of the bar of this county, and at the time of the commission of the grievances of which he complains he was, and for some seventeen years immediately preceding had been, the lessee of offices on the third floor of a building owned, and occupied in part, by the Leader Publishing Company, hereafter called the Leader Company, in which he was engaged in the practice of law. Adjoining the Leader Building on the East is the Maeder Building, owned by the defendant, with a common or party wall between them. In the reduction of the "Hump" the City regraded Fifth Avenue in 1912, whereby those two buildings stood six or seven feet higher than the level of the new grade. In order to conform to the new conditions the defendant decided to lower his entire building, and the Leader Company concluded to adjust its building, for the same reason, at or about the same time, and more or less in conjunction with the work of the defendant. In order to drop or lower the party wall between the buildings, leaving the Leader Building standing as theretofore, it was necessary to cut the front and end walls and floors of the latter from the party wall. The defendant employed a contractor to do the work, according to certain plans and specifications. The Leader Company employed the same contractors, and it would seem that the work on both buildings were under the supervision of the same architect. The work of lowering the defendant's building was begun first, and on the inception or beginning of the same and in the prosecution of that work, defendant's contractors entered the corridors or hallways of the Leader Building, utilized and contracted the hallway used by the plaintiff on the third floor in reaching his office, entered his offices, placed supports therein and placed and extended certain beams in and through the window or windows of his office, whereby he was deprived of the use and occupancy of his law offices for a period of three or four months. It is unnecessary to give a detailed statement of the manner of doing the work necessary to accomplish the purpose that the defendant had in view, or to pass on the merits of the respective contentions. We are now concerned only with the question whether there was evidence on the part of the plaintiff requiring a submission of the case to the jury. The plaintiff testified that the defendant's contractors invaded his leased premises without his consent; that they so used his windows that they could not be closed during the cold weather; that the hallway was rendered practically useless, and that altogether he was deprived of the use of his

offices during the greater part of a period of several months.

Is the defendant liable for the acts of his contractor in doing the work either in a negligent or non-negligent manner? We do not think he is. In the first place, to successfully accomplish the work of cutting the defendant's brick building of some five or six stories high from the building of the Leader Company and then lowering it bodily some six or seven feet to the level of the new grade, required special skill possessed only by persons following that line of business. There is no evidence that the defendant had any knowledge of the subject. He was then obliged to do just what any property owner would have to do, and had the right to do, viz: to employ persons possessed of the necessary skill, and that he did. He then entered into a contract with John Eichleay, Jr., Company to do the work for a lump sum. There is no evidence that the defendant knew, or might have known, from reasonable inquiry, that his contractors, in doing the work committed to them, would infringe on any of the rights of the plaintiff as a tenant in the adjoining building. The contractors used their own means and methods in respect of all the details of the work in the course of an independent occupation and contract, without any control over them by the defendant. The contractors had possession of the buildings, so far as was necessary for their particular purposes, without any control or direction of the defendant, except to see that the work was done according to the plans and specifications. We are of opinion that any injury suffered by the plaintiff was caused by the acts of John Eichleay, Jr., Company, who at that time sustained the relation of independent contractor, for whom the defendant was not responsible. The defendant employed well-known, experienced and competent coutractors, in a kind of work of which the plaintiff had no knowledge; they furnished their own men and materials, and did the work in their own way, free from the control of the defendant. If the plaintiff was injured in the course of the work it was not due to the failure of the defendant to discharge a duty that he owed him under the law. We cannot agree with the defendant's contention that the plaintiff's remedy is against the City of Pittsburgh. The plaintiff's complaint is not of the inconvenience and damage to him caused by a reduction of the grade of the street, but for an invasion of his leased premises in a manner for which the city is not responsible. Had his action been against the contractors we would have had an entirely different proposition before us.

The motion for a new trial is refused.

O'Neil v. Heininger.

Accord and Satisfaction—Insurance.

To a statement filed by the liquidator of a defunct live stock insurance company, averring indebtedness by reason of assessments on policy holders for unpaid losses and expenses, defendant filed an affidavit of defense averring agreement on the part of the plaintiff to accept $111.78 in full satisfaction of all claims and the payment of the same by check. HELD, to be a sufficient defense.

No. 353 January Term, 1917.

Motion for judgment for want of sufficient of defense.

R. S. Frey and *M. S. Niles* for motion.

H. O. Ruby, contra.

August 6th, 1917. ROSS, J.—The plaintiff in this case was appointed as liquidator of the York County Mutual Live Stock Insurance Company by the Dauphin County Court, as set forth specifically in his statement of claim against the defendant, and as such liquidator, sues the defendant to recover the sum of forty-three dollars and ninety-nine cents, with interest thereon from the first day of May, 1916.

The statement sets forth that "the York County Mutual Live Stock Insurance Company was chartered January 3rd, 1907," * * * "under the laws of Pennsylvania, and thereafter and up to the time of its dissolution transacted the business of live stock insurance in Pennsylvania.

Its home office at the time of dissolution was located in York, York County, Pa.

By order of the Court of Common Pleas of Dauphin County, Pa., in the cause Commonwealth of Pennsylvania, Ex-Rel. Charles Johnson, Insurance Commissioner, v. York County Mutual Live Stock Insurance Company, Commonwealth Docket No. 4, 1916, the corporation was ordered and decreed dissolved and its affairs liquidated by and under the direction of the Insurance Commissioner of Pennsylvania, all in accordance

with the Act of General Assembly of June 1, 1911, (Pamphlet Laws 599)."

The statement also alleges in substance that the defendant was the holder of several policies issued by the Company, one about the 13th day of April, 1908, one dated the 6th day of May, 1910, and one dated the 25th day of February, 1911, and numbered respectively 1197, 2442, and 3104, each policy having been issued on the written application of the defendant and while the corporation was a going concern.

The statement also alleges that "as required by the aforesaid by-laws and the conditions of the policies, the defendant signed three promissory notes, one of which was part of each policy and attached to the aforesaid application, agreeing to pay within thirty days after notice to the York County Mutual Live Stock Insurance Company such sums as the said Company required to pay losses of the defendant and each and all members and policy holders, and also to pay expenses of the aforesaid Company, but with the understanding and agreement that the defendant was obligated to pay not more than a total of $111.10 for losses and expenses under policy No. 1197; $114.50, under policy No. 2442; and $10.00 under policy No. 3104; the said sums being the total of defendant's liability in the period of three years, and likewise being the basis of assessments.

It is not necessary, for the purpose of the present inquiry, to further quote from the plaintiff's statement, for the seventh paragraph of defence avers as follows:

"7. On or about the 24th day of March, 1916, there arose between the parties to this suit a dispute as to the amount of the defendant's liability to the York County Mutual Live Stock Insurance Company and it was agreed that the plaintiff would accept the sum of $111.78 in full satisfaction of the defendant's liability, whereupon the defendant made his check payable to the Statutory Liquidator or his agent for the said amount, in full of all his liability by reason of the assessments levied upon him and his connection with Insurance Company aforesaid, and said check was accepted as such by the plaintiff, as evidenced by the endorsement on the back of said check."

This, in our opinion, is such a complete averment of accord and satisfaction, that it must prevent the entry of any judgment on the pleadings alone.

The motion for judgment for want of a sufficient affidavit of defense is refused.

C. P. of Lackawanna Co.

Bradigan et al. v. Scranton Railway Co.

Contributory Negligence—Personal Injuries —Street Car—Obvious Danger—Infant.

Where a boy twelve years of age was struck and injured by a street car while trying to recover from the track a plaything known as a "sling shot," and he testified on the trial that he saw the approaching car, fully realized and calculated upon the risk involved, and would have escaped injury but for an unforeseen slip of his foot, a verdict should be directed for defendant.

The presumption that a boy under the age of fourteen years is incapable of appreciating or avoiding danger has no weight as against his own avowal to the contrary.

To the rule that a party is bound by his own testimony, so far as its import is free from doubt and ambiguity, there is no exception in favor of a plaintiff under the age of fourteen years.

Motion for judgment for defendant on the whole record.

W. B. Landis for plaintiffs.

Warren, Knapp, O'Malley & Hill for defendant.

June 26th, 1917. NEWCOMB, J.—There was a mistrial by reason of disagreement of the jury on the initial question as to how the accident happened out of which the suit arose. This had been formally submitted and further instruction reserved to await the finding on that specific issue. Among other things so reserved was defendant's request for binding instruction, the merits of which form the question now raised by this motion.

Father and minor son sued for damages on account of an injury suffered by the son who was alleged to have been run down on the street by one of defendant's cars.

Their averment was that the boy, then in his twelfth year, was crossing the street and suffered the injury by reason of the excessive speed of the car coupled with the omission of warning by bell or otherwise. The proof was that the car was going at the speed usual at that place, with which the boy was familiar, not to exceed ten miles an hour, and that at all times with which the case is concerned it was not only in plain sight but he was in fact looking at it and taking special note of its approach. Neither did he claim to have been crossing the street. While the accident occurred near a flagstone crossing—not one, however, at a street intersection—that fact is without significance. The place of the accident was on East Drinker Street, running east and west,

in the Borough of Dunmore. The railway track is single and laid on the southerly side of the street. The car was eastbound. According to all the adult witnesses—apparently disinterested and unbiased—the accident was the result of the boy's attempt to jump on the car as it passed. The request for binding instruction, however, was based upon his own version of the thing. According to that he went on the track to pick up a plaything under circumstances which would preclude recovery by an adult for his own temerity. The allegation of excessive speed was abandoned at the argument and the contest, therefore, now reduces itself to the narrow inquiry whether the question of the boy's capacity to avoid a manifest peril must be submitted to the jury as a disputable inference of fact notwithstanding his own avowal that he was fully sensible of the danger, had calculated upon it, and would have made good his calculation and escaped the injury but for an unforeseen slip of his foot.

That he is a bright boy is neither disputed nor disputable. On the stand he made it plain that he would resent any imputation to the contrary. He was not without self-assurance and on occasion could make shift to lecture counsel in order to keep him within what he conceived to be the bounds of proper cross-examination.

Being on the southerly sidewalk with three companions, he claimed to have been amusing himself with a sling shot by shooting pebbles at a dog on the opposite side of the street. The car came into view nine hundred feet to the westerward. He noted its approach and the identity of the conductor, whom he was at pains to have it understood he well knew, because he had traveled on his car "and paid my own way too, many's the time."

He took his last shot after noting that the car was about one hundred and fifty feet distant. What damage was done to the dog, if any, does not appear; but the shot proved to be the undoing of his weapon. The elastic parted company with its fixture and landed on the track near the farther rail. In chief he accounted for his injury in this way: "Q. Did you notice the street car coming when you went out to get the rubber band? A. Yes, sir; but I thought I would have lots of time to get over and have the rubber picked up, and if I didn't have slipped I would."

Cross-examined more at length on the point he testified as follows: "Q. And when you got to that point and looked * * * you saw the car coming? A. Yes, sir. Q. And the car was down a little way? A. Yes, sir. Q. And you thought you could get across ahead of the car? A. I thought I would have time to pick up the sling shot. Q. But when you started to cross the track ahead of the car you saw the car coming? A. Yes, I saw it coming when I was at the place and then I shot. Q. * * * And you knew the car was coming then, didn't you? A. Yes, Sir. Q. And when your sling shot dropped you thought you could get it and get out before the car could catch you? A. Yes, sir. Q. And you knew if you did not get across in front of it —you knew the car would catch you and injure you, didn't you? A. Yes, sir. Q. And knowing that, you went in to get the sling shot and while you were there your foot slipped? A. Yes, sir."

This describes no thoughtless, heedless act of an impulsive child, either unmindful of his surroundings, insensible of the risk he was running, or incapable of appreciating and avoiding it. Taking him at his word, his account of the casualty leaves no debatable question either of his knowledge, presence of mind, or capacity to choose as between the place of safety and that of danger; for his act was one of deliberation done in pursuance of specific calculation as to his ability to escape a conscious peril, which miscarried only through the untimely slip of his foot— a remote chance upon which he had not calculated.

A boy's capacity is the measure of his responsib lity; and if he has not the ability to foresee and avoid the danger to which he may be exposed, negligence will not be imputed to him if he unwittingly exposes himself to it; Kelly v. Traction Co., 204 Pa. 623. Under the age of fourteen years he is entitled to the benefit of the presumption that he is without capacity. But this, like any other presumption of fact, is rebuttable and that gives rise to the general rule that the defendant in such case assumes the burden of affirmative proof in order to overcome the negative presumption. It follows that where the countervailing proof comes from sources supplied by defendant, or, for that matter, from any source except the mouth of plaintiff himself, it must inevitably be circumstantial and as such would furnish ground only for an inference of the essential fact to be drawn only by the jury.

But that is not this case. The fact of ability and capacity is distinctly avowed here by the plaintiff. Thus the presumption vanishes, and to submit the question of his negligence would be simply to accord the jury the privilege of an arbitrary and unfounded inference to the contrary of plaintiff's unequivocal assertion upon a point whereof he alone can speak decisively. To the rule that a party is bound by his own testimony, so far as its import is free from doubt and ambiguity, there is no exception in favor of a plaintiff under the age of fourteen years.

It is believed that defendant's request for binding instruction should have been affirmed, and the rule for judgment is accordingly made absolute. Let judgment be entered for defendant on the whole record, with exception for plaintiff, *sec. leg.*

OBITUARY.

John W. Bittenger.

Ex-Judge John W. Bittenger, of the York County Courts, who occupied the bench for a period of twenty-one years, died at 4:45 p. m., Monday, August 27, 1917, at his residence, 36 North Duke street, York, Pa. Death was caused by chronic nephritis. He was confined to his bed only a week. The deceased was in his eighty-third year.

Since his retirement from the bench, in 1911, Judge Bittenger practiced law. He had gained for himself a state-wide reputation as a leader in his profession. He was president of the board of trustees of the York County Academy and a member of Trinity Reformed Church. Among the orders with which he was affiliated, are: York Lodge, No. 266, Free and Accepted Masons; Mt. Zion Lodge, No. 74, I. O. O. F.; Mt. Vernon Encampment, No. 14, I. O. O. F., and Conewago Tribe, No. 37, Improved Order of Red Men. He was also a member of the York Club.

The deceased leaves the widow and four children: Ida M. Bittenger, at home; Mrs. J. A. Hollinger, 108 South Water street; Mrs. G. G. Morgan, Richmond, Va., and Daniel S. Bittenger, Atlantic City. He also leaves a sister, Mrs. Louisa Young, Hanover.

Ex-Judge John W. Bittenger was born at York Springs, Adams County, Nov. 10, 1834, son of Henry and Julia A. Sheffer Bittenger. He was descended on both his paternal and maternal sides from patriotic soldiers of the Revolutionary war. He acquired his elementary education in the public schools, at the Academy at Strasburg, Pa., and at Rockville, Md., which was supplemented by a partial course at Pennsylvania College, Gettysburg. While studying at Pennsylvania College he registered with Moses McClean, of Gettysburg, as a student at law.

He subsequently went to Rockville, Md., where he finished his legal studies in the office of W. Viers Bonic, subsequently judge of the circuit court of that county and was admitted to the bar of Montgomery county in 1856. In that same year Mr. Bittenger entered Harvard Law School and was graduated in 1857 with the degree of LL. B. He then went to Lexington, Ky., and entered upon the practice of his profession, remaining in that state three years.

Attorney Bittenger removed to York in 1860, being identified with its bar and judiciary until the time of his death. In politics he was always a Democrat, having been a leader and campaign orator in the Democratic contests in York county. In 1862 he began his official career with the nomination for and election to the district attorneyship of the county, at the end of his first term being re-elected.

In 1888 Mr. Bittenger represented his party in the national convention at St. Louis. In November, 1890, he was appointed by Governor Beaver to fill the vacancy occasioned on the bench by the death of Judge John Gibson. The same year Mr. Bittenger became the nominee of his party for the judgeship. He was elected at the November election and in 1900 was re-elected by a handsome majority, the Republican party having endorsed him in convention and made no nomination against him. From 1895 until his retirement from the bench he acted as president judge of the York County courts.

The funeral was held on August 29th, 1917, with services conducted by the Rev. Samuel H. Stein, pastor of Trinity Reformed Church, at 2 p. m., at the house. Interment at Prospect Hill Cemetery.

At the meeting of the Bar Association, the following resolution was presented by George S. Schmidt, who moved its adoption:

"The York County Bar Association has learned with deep regret of the sudden demise of Hon. John W. Bittenger, for twenty-one years judge of this court. He died after only a week's illness, full of years and honors and was widely known and universally respected.

"Born in an adjoining county he sprang from a stock of distinguished Pennsylvanians. His academic studies were pursued in his native state and after taking his degree at Pennsylvania College at Gettysburg, he studied law and in 1856 was admitted to practice at Rockville, Maryland, and in the same year entered Harward Law School where in the following summer he received his degree of LL. B.

"After practicing law in Lexington, Kentucky, for a period of three years, he located in York and for more than half a century devoted his time and talents to his chosen profession. He became widely experienced in the practice of law and in the administration of justice and his ability and probity were recognized by the people, whom he served long and faithfully with honor to himself and with credit to the county. His initial election as District Attorney in 1862 gave opportunity for the demonstration of his ability and so successful was his administration of that trust that he was reelected for a second term. Upon the death of President Judge John Gibson he was appointed by Governor Beaver in 1890 judge of this court and in the fall of the same year was elected to that high office. At the expiration of his first term he was re-nominated by his party for the same high place and received the distinguished and most exceptional honor of an endorsement of his candidacy by his political opponents. Throughout his judicial career he knew no partisanship, no bias, no prejudice; he administered the law without fear and without favor, and strove always to dispense justice tempered with mercy. He held high the ideals of the bench and bar and maintained the standard of his predecessors in office. During the entire period of his service no breath of suspicion was directed against either his motives or his conduct and for twenty-one he wore the ermine unsullied. In 1911 he retired to private practice, in which he was engaged at the time of his death. Strong alike in body and mind he courageously withstood the storms of life, which batter down the men of weaker mold.

"He adorned his profession and was zealous in its study and as a citizen was interested in the religious, educational and social life of the community. He was a sincere Christian and after reaching the summit of life's pilgrimage passed down tne decline through the lands of lengthening shadows, filled with faith and crowned with Christian hope. He died at the age of 82 years and left his family the priceless heritage of a good name, and to the bar of York County an example of a long, useful and honorable life, full of distinguished achievment."

The resolution was seconded by H. C. Niles, who paid the following tribute to the dead jurist:

"The best boon with which a community can be blest is a competent, faithful, impartial judge.

"This county has been fortunate in a bar which has produced a line of honest and learned lawyers upon the bench, who have supervised the administration of justice here with wisdom and equity. Many of us have practiced under Judges Fisher, Wickes, Gibson, Latimer, Bittenger, Stewart, Wanner and Ross.

"Under these good men the bar and all citizens have at all times felt sure that systematic justice would be administered freely without sale, fully without denial and speedily without delay. In this distinguished succession, Judge Bittenger held his honored place for twenty-one years.

"All lawyers, both on the bench and off, have peculiarities and faults; but no suitor ever had reason to fear that his cause might be wrongly decided by Judge Bittenger because of wrong intent or conscious partiality or prejudice.

"No matter how hot might be the argument, or keen the dispute, between counsel and court, every candid lawyer among us confessed and believed that Judge Bittenger earnestly desired above all else to do his duty.

"This is the best that can be said of any judge, of any lawyer, of any man.

"The record of sincere endeavor to keep the courts above suspicion, to administer impartial and substantial justice and to encourage every elevating influence is cause for this county long to cherish the memory of Judge Bittenger; and furnishes an ex-

ample worthy of imitation of his fellows at the bar, who remain to honor him and mourn his death.

Remarks were also made by James G. Glessner and Allen C. Wiest. The resolution was adopted unanimously and directed to be spread upon the minutes of the association. The president of the association was directed to present the resolution to the court and ask that it be ordered spread upon the records of the court.

COMMON PLEAS

Lerew's Executors v. Bentzel

Justice of the Peace—Certiorari—Title to Land.

In a suit before a Justice of the Peace, before any testimony was heard, defendant filed an affidavit setting forth that "the title to lands may and will come into question." Notwithstanding, the Justice proceeded with the cause, defendant offered no evidence, and judgment was entered for the plaintiff. On certiorari, HELD, that the proceedings must be set aside.

No. 82, April Term, 1917.

Certiorari.

Proceedings before John K. Evans, Esq., a Justice of the Peace.

Jas. G. Glessner and *James L. Young* for exceptions.

S. B. Meisenhelder, contra.

August 6, 1917. ROSS, J.—The records brought before this court on the above writ, show that the defendant, on the 24th day of February, before any testimony was heard, filed with the Justice the following affidavit, "And now, February 23rd, 1917, George Bentzel, the defendant in the above case, being duly affirmed according to law, deposes and says that the above cause of action is founded upon and arises from a real contract, expressed or implied, where the title to lands may and will come into question, that the said justice therefore has no jurisdiction in the matter and that he, the said defendant, for that reason, before the trial of said case is begun, requests that this affidavit be filed, and made a part of the record in the proceeeings thereof and that said case be dismissed."

The affidavit was made before John C. Reeser, a Justice of the Peace, and was signed by George Bentzel.

After the above affidavit was filed the Justice proceeded with the hearing by taking the evidence of the plaintiffs, but does not give any of it in the transcript.

The transcript then shows the following:

"Defense offers no evidence. After hearing proofs and allegations of both plaintiffs and their attorney, judgment reserved for nine days."

"March 2nd, 1917, judgment in favor of plaintiff, John A. Lerew and Wm. H. Lerew, Executors of Isaac Lerew, deceased, and against defendant, George Bentzel, for $89.88 and $2.60 interest and costs of suit."

"There being no evidence to show that the title to land may come into question, the Justice being of the opinion that he has jurisdiction."

The uniform decisions of the courts have been to the effect that since the passage of the Act of July 7th, 1879, Section 1, P. L. 194, an affidavit that the title to real estate may come into question, as a defense, filed before the hearing by the defendant, is sufficient to deprive the magistrate of jurisdiction; James v. Brezezinski, 23 D. R. 554; Shober v. Henry, 8 Y. L. R. 163; Brillhart v. Ramer, 12 Y. L. R. 85; Pearre v. White, 4 D. R. 504.

The seven exceptions filed by the defendant to the record of the Justice of the Peace, as it is brought before us, are fatal to the judgment which he entered.

The judgment entered by the Justice of the Peace is reversed, at the costs of the plaintiffs.

C. P. of Alleghany Co.

Dzikowska et al. v. Superior Steel Co. et al.

Workmen's Compensation — Waiting for Material—Period of—Duties of Employment.

An employe is within the Workmen's Compensation Act of 1915, and he or his dependents are entitled to compensation where an accident happens while an employe is waiting for a tool or material, ready to renew his work as soon as that is furnished to him. He is at that time engaged in the furtherance of his employer's business. The time is uncertain. He must be always ready and this act of waiting that there may be some person at hand to continue the work at the proper time is a part of the service which the employe is rendering to his employer.

It is no defense under the Workmen's Compensation Act of 1915 to a claim for compensation on the ground that the employe was not actually engaged "in the furtherance of the business or affairs of his employe" in a case where, during an indeterminate period of waiting far the arrival of steel to be loaded on trucks, the employe was seen to emerge from a nearby box car with his clothes on fire, and he died as a result of the burning, in that he had not been called off from work. and, in renewing his work, would not be called back. He was there ready to work as soon as the material was ready for his hand and during that period was actually engaged in the duties of his employment.

Appeal from Workmen's Compensation Board.

Allan Davis, for plaintiff.

Reed, Snow, Shaw & Beal for defendant.

April 23, 1917. EVANS, J.—This case comes before the court on exceptions to the decision of the Workingmen's Compensation Board. The husband of the claimant at the time he met his death was in the employ of the defendant, The Superior Steel Company, and was working in what was known as the shipping room. His duties were to transfer pieces of cold rolled steel from the trucks of the Steel Company to cars of the Railroad Company, and at times during the course of the day while he was awaiting the arrival of a truck loaded with steel, or awaiting the placing of a railroad car in position, the employe would not be actively engaged in work. These periods of suspension of work would be indeterminate, sometimes longer and sometimes shorter, depending, of course, upon the delay in the arrival of the loaded truck or in the placement of the empty car. During one of these periods the employe was seen coming out of a box car with his clothes on fire, and he died as a result of the burning. It is supposed, and is probably correct, that he went into the box car and in attempting to light a pipe or cigar or tobie, by scratching a match upon his trousers, he set himself on fire. There was considerable oil and grease on the steel he was handling and his clothes were pretty well saturated with that substance. The only exception pressed upon the argument of the case was that the death of the deceased was not caused by an accident in the course of his employment. Section 301, Article III, of the Workingmen's Compensation Act, P. L. 738, reads as follows:

"When employer and employe shall by agreement, either expressed or implied, as hereinafter provided, accept the provisions of article three of this Act, compensation for personal injury to, or for the death of, such employe, by an accident, in the course of his employment, shall be made in all cases by the employer * * * ."

The second paragraph of this section provides:

"The term 'injury by an accident in the course of his employment,' as used in this article, shall not include an injury caused by an act of a third person intended to injure the employe because of reasons personal to him, and not directed against him as an employe or because of his employment; but shall include all other injuries sustained while the employe is actually engaged in the furtherance of the business or affairs of the employer * * * ."

It is contended by the appellant that at the time of this accident the deceased was not actually engaged "in the furtherance of the business or affairs of his employer." This was not a rest period. It was not a period when, by the rules of the employment, the employe was free from the duties of his employment. It was an indeterminate period of waiting for the occurence of an event which would renew the active operations of the employment. That might be a minute, or it might be very much more. But the employe had not been called off from work, and in renewing his work, would not be called back. He was there ready to work as soon as the material was ready for his hand. I am inclined to think that during this period he was actually engaged in the furtherance of the business or affairs of his employment. To hold otherwise would prevent compensation to an employe injured, if even for an instant his work was stopped and he was injured during that period. I do not think it was intended that compensation should only follow in case of an accident which resulted from the work which he was doing. According to the contention of the appellant, if the deceased, as he walked from the railroad car to the truck after delivering a piece of steel, took the match and scratched it on his trousers to light a tobie and had been burned by the fire ignited with that match, he would come within the provisions of this Act. But supposing he had stopped, if only for a minute, from the car to his truck, and talked to a fellow workman, according to the contention of the appellant he would not be at that time engaged in the furtherance of his

employer's business. I think that is too narrow a construction to place upon this Act.

When an employe is waiting for a tool or material, ready to renew his work, as soon as that is furnished to him, he is at that time engaged in the furtherance of his employer's business. The time is uncertain. He must be always ready and this act of waiting that there may be some person at hand to continue the work at the proper time is a part of the service which the employe is rendering to his employer.

The exceptions to the award of the Workingmen's Compensation Board are dismsissed.

Glatfelter v. American Phosphorus Co., No. 2.

Practice—Amendment—Term.

After the expiration of the term at which judgment on demurrer was entered for defendant, plaintiff asked for leave to amend the statement. HELD, that the amendment must be refused.

Where a demurrer to a statement of claim has been sustained and judgment has been entered for the defendant, no amendment can be allowed until the judgment has been opened or vacated.

An application to open or vacate a judgment entered adversely, after a hearing or trial, must be made before the end of the term at which the judgment is entered.

The law controlling the opening or vacating of adverse judgments has not been changed by the Practice Act, 1915.

No. 38, January Term, 1917.

Motion to amend plaintiff's statement.

For the opinion of the Court, on a demurer to plaintiff's statement, see Glatfelter v. American Phosphorus Co., 30 YORK LEGAL RECORD, 195.

Logan & Logan for motion.

W. B. Hays, contra.

August 27, 1917. ROSS, J.—This action in trespass was brought by the plaintiff as employee, to recover damages from the defendant, as his employer, for injuries which the plaintiff alleges he received while in such employment, through the inhaling of and contact with, red phosphorus, which he alleges caused him to contract a disease known as necrosis.

The action was brought to No. 38 of January Term, 1917, under the "Practice Act 1915."

The plaintiff's statement was filed November 15th, 1916.

An affidavit of defence was filed on December 2nd, 1916.

The affidavit of defence raised questions of law as to the adequacy of plaintiff's statement under the 20th section of the Practice Act 1915.

Among the questions of law raised was the following:

"1. The statement of claim is indefinite and uncertain in that it does not show that the claim is within the jurisdiction of this Court and not governed by the Workmen's Compensation Act of 1915, P. L. 736."

After the questions so raised had been regularly placed upon the argument list and argued under the rules of court, this Court, in an opinion rendered March 5, 1917, decided as follows:

"The question of law raised by the first paragraph of defendant's affidavit of defence, in that it (the plaintiff's statement) does not show that the claim is within the jurisdiction of this Court and not governed by the Workmen's Compensation Act of 1915, P. L. 736, is decided in favor of the defendant, and judgment is accordingly entered against the plaintiff, without prejudice to any legal right which he has to proceed in the proper forum."

It seems that no appeal was taken from this judgment, and, so far as the records before us disclose, no exception was formally entered to the court's ruling.

The term at which the judgment was entered was January Term, 1917, and it ended and the next term of this court began the third Monday of April, or Monday, April 16th, 1917.

The proceeding now before the court is to determine a rule to show cause why the prayer of the plaintiff's petition should not be granted.

The said petition was presented, to this Court, June 25th, 1917, and is as follows:

"The petition of Philip Henry Glatfelter, respectfully represents:

"On, to wit, March 5, 1917, your Honorable Court decided the question of law raised by the Affidavit of Defense, filed by the Defendant to the Statement of Claim, filed by the Plaintiff, the Court's ruling and judgment being as follows:

"The question of Law raised by the first paragraph of Defendant's Affidavit of Defense, 'in that it does not show that the claim is within the jurisdiction of this Court and not governed by the Workmen's Compensation Act of 1915, P. L. 736,' is decided in favor of the defendant, and judgment is accordingly entered against the plaintiff, without prejudice to any legal right which he has to proceed in the proper forum."

"Your petitioner prays the Court to rescind, open and amend the said ruling and judgment in so far as may be necessary to allow the plaintiff to file the amended plaintiff's statement of claim submitted herewith, and make such other order as may be just, in accordance with the provisions of the "Practice Act," 1915;

"And for such other relief as to your Honorable Court may seem meet;

"And he will ever pray.

P. H. Glatfelter."

The judgment entered by the Court in favor of the defendant was practically a judgment on a demurrer.

It has been decided that, "where a demurrer to a statement of claim has been sustained and judgment has been entered for the defendant, no amendment can be allowed until the judgment has been opened or vacated;" McCready v. Gans, 242 Pa. 364.

"An application to open or vacate a judgment entered adversely, after a hearing or trial, must be made before the end of the term at which the judgment is entered;" McCready v. Gans, 242 Pa. 364; King v. Brooks et. al., 72 Pa. 363; Miller v. Baker, 64 Pa. Sup. Ct. 124; Herndon Borough (opinion) 19 Pa. Sup. Ct. 129; Abeles & Co., v. Powell, 6 Pa. Sup. Ct. 123; Hill v. Egan, 2 Pa. Sup. Ct. 596.

The records of this case show conclusively that the petition was presented after the close of the term at which the judgment was entered, and therefore, under the above cited and well settled principle, this Court is without power to rescind or open the judgment so entered; consequently, the statement already filed in the case cannot now be amended.

It is not necessary, for the disposition of the present controversy, that this Court here discuss or decide any of the collateral matters brought before it by the oral arguments of the counsel, or the matters contained in the proposed amendment of the plaintiff's statement of claim. There is nothing regularly or legally before the Court, except the records of this case prior to and including the filing of the petition upon which the rule was granted. If any action was taken by the plaintiff, against the defendant, under the "Workmen's Compensation Act of 1915," it is certainly not within the province of this Court to regard it in the present inquiry, because it has not been made a matter of record in this Court in any way, either by an appeal as provided by the Act itself, or by certified copies of the records.

The law controlling the opening or vacating of adverse judgments has not been changed by the Practice Act, 1915.

Petitition is dismissed and the rule granted thereunder is discharged at the cost of the petitioner.

C. P. of Schuylkill Co.

Reinbold v. Meyers

Jurisdiction—Justice of the Peace—Title to Land—Amendment.

A Justice of the Peace issued a summons in trespass; the defendant filed an affidavit of defense alleging that the title of the land will come in question; the defendant tendered half the costs but refused to enter into a recognizance as required by the Act of July 2, 1901, P. L. 608; after judgment for plaintiff a transcript was filed in the Common Pleas and a statement was served to which a plea of not guilty was entered; a rule was entered to amend the plaintiff's statement to claim damages to the amount of $2500 00 instead of $300.00. HELD, the rule must be discharged.

The Act of March 22, 1814, 6 Sm. 182, conferred jurisdiction on Justices of the Peace in actions of trespass brought for the recovery of damages for injury done or committed on real or personal estate in all cases where the value of the property claimed or the damages alleged to have been sustained shall not exceed one hundred dollars and the Act of 1879, P. L. 194, increased such jurisdiction to three hundred dollars.

The Act of July 2, 1901, P. L. 608 provides that in cases where the title to land comes in question the Justice shall not dismiss the suit but transmit a copy of the record to the Prothonotary of the county who shall enter the same on his docket and the suit shall proceed as if originally brought in the Common Pleas; this Act does not increase the amount of the jurisdiction of the Justices and the amount cannot be enlarged after the case is in the Common Pleas and the statement cannot be amended so as to show an action for a larger amount than that before the Justice.

Motion to amend.

W. B. Durkin, J. W. Moyer, L. E. Enterline and *G. H. Gerber* for Plaintiff.

George W. Ryan for Defendant.

July 23, 1917. KOCH, J.—On the 13th of September, 1902, a summons in trespass was issued by R. M. McCormack, a justice of the peace in the Township of North Union, commanding the defendant to appear before said justice on the 20th of September, 1902, between the hours of two and three o'clock in the afternoon. Service of the summons was made upon both defendants. At the time fixed for the hearing, Robert Meyers, agent, produced affidavits taken and subscribed to before Morgan Griffiths, a justice of the peace, on the 17th. day of September, 1902, stating, "that the title of the land will come in question." Robert Meyers, agent, tendered half the costs but refused to enter a recognizance as required by the Act of July 2nd., 1901, P. L. 608. The justice proceeded with the hearing and the evidence showed that defendant had cut timber to the value of Seventy-five dollars on land claimed by the plaintiffs. The case was adjourned at the request of Robert Meyers, agent, to Wednesday, October 1st., 1902, at three P. M. On the latter date, the parties appeared and Robert Meyers, agent, asked that the case be certified into court in accordance with the terms of the act referred to. One Frank Wharmby became bail absolute to the plaintiffs "in the sum of one hundred and twenty-five dollars for the payment of the * * * claim for damages and all costs accrued or that may legally be recovered against defendant." A transcript of the record was certified on the same day and was filed to the above number and term, on the 27th of October, 1902 by Mr. Durkin, attorney for the plnintiffs. On the 7th. of November, 1906, A. W. Schlack, Esq., now deceased, filed a statement of the plaintiffs' claim, in which it is averred "that one James Van Blargen in his life time was seized in fee of and in a certain tract of land, containing 15 acres or thereabouts, situate in North Union Township, in Schuylkill County, Pa., and known as the saw mill tract" etc; "and that James Van Blargen died in the year 1900 or thereabouts, intestate, and that the land descended to his children and heirs." It is further averred in the statement, that on the 1st day of January, 1902, the defendant "cut down upon the said tract of land a large number of timber and other trees there standing," etc. Said statement lays the damages at three hundred dollars. At the same time that the statement was filed, an order of court made under an agreement between counsel for the respective parties to the suit was also filed, substituting Mary Ann, the wife of Samuel Bautscher, George W. Van Blargen, William Van Blargen, Rebecca, the wife of Daniel Ulshaefer, Elizabeth, the wife of Henry Reinbold and James Van Blargen "as plaintiffs in this cause with like effect as if this action had originally been commenced by them in their own proper name," said order having been made on the 22nd day of October, 1906. A plea of "not guilty" seems to have been filed by the defendants on November 2nd, 1906. Nothing more appears to have been done in the case until the 15th. of June, 1915, when Messrs. J. W. Moyer and Enterline and Enterline, counsel for William H. Van Blargen, as plaintiff, formally entered an appearance for said William H. Van Blargen. On the 4th. of June, 1917, on motion of J. W. Moyer and G. H. Gerber, atterneys for plaintiffs, a rule was granted on the defendants to show cause why the plaintiff's statement should not be amended as prayed for. The prayer is for "an order directing and permitting the statement to be amended by striking out the amount of $300 in the plaintiffs' statement as filed and inserting in place thereof the amount of $2500, so that the plaintiff's amended statement will conclude as follows, to wit;- damages to the sum of $2500, for the recovery of which from the said defendants this suit is now brought by these plaintiffs." The rule was made returnable on the 18th of June, 1917, and the formal answer of Dr. Meyers was filed on the 18th day of June, 1917. The plaintiffs base their right of amendment upon the allegation "that after the institution of this suit defendant continued trespasses upon the land of the plaintiffs by cutting and removing trees on the said land of the plaintiff, by which acts of the defendant the injury or amount of damages done to the land of the plaintiffs was greatly increased so that the amount of damage claimed in the plaintiffs' statement does not cover the whole damage done to the plaintiffs by the defendants."

On the 9th of June, 1917, Messrs. Gerber and Moyer, attorneys for plaintiffs' filed notice, with acceptance of service by defendants, "that the plaintiffs in the above case will claim damages to the date of trial, this under the Act of May 2nd., A. D., 1876, P. L. p. 95."

May the statement of claim be amended in the manner contended for by the plaintiffs in this case? The Act approved March 22nd, 1814, 6 Sm. 182, conferred jurisdiction on justices of the peace in "actions of trespass brought for the recovery of damages for injury done or committed on real and personal estate, in all cases where the value of the property claimed or the damages alleged to have been sustained, shall not exceed One hundred dollars. An Act No. 211, passed in 1879, P. L. 194, enlarges the jurisdiction to cases "wherein the sum demanded does not exceed Three hundred dollars." The Act of 1814 was amended by an act approved the 2nd of July, 1901, P. L. 608.

From the above quotation from the plaintiff's petition for the amendment of the s,atement in this case, it is apparent that the increased damages demanded are for new and additional acts of trespass committed after the institution of this suit, acts so numerous and disastrous as to increase the damages from $75.00 to $2500.00. Now, as the justice of the peace had no jurisdiction of an amount so large, we cannot assume jurisdiction of a larger amount in this case than the justice of the peace could have assumed, before it was made to appear that the title to the land is in question. The Act of May 2nd, 1876, P. L. 95, does not refer to cases before justices of the peace. It is not practicable in such courts, because, by its provisions, notice must be given "not less than fifteen days before trial," whereas trials before justices of the peace are generally held on the date fixed in the summons for the defendant's appearances which can never be more than eight day, after the date of the summons, service of which must be made at least four days before the time of hearing.

The Act of 2nd July, 1901, P. L. 608, which provides that, in cases where the title to the land comes in question, the "justice, alderman or other magistrate, instead of dismissing said suit, shall transmit a copy of the record thereof and of all proceedings therein to the Prothonotary of the Court of Common Pleas of this County, who shall enter the same in his docket; and the said suit shall then be proceeded in the said court as if originally rightfully brought therein," does not increase the amount of the justice's jurisdiction. We are dealing here with the question of the justice's jurisdiction, so far as the amount in contraversy is concerned. He has no jurisdiction of an amount exceeding $300.00, and the amonnt cannot be enlarged by carrying the case into a Court of Common Pleas; Weidenhammer v. Bertle, 103 Pa. 448. When the amount involved in an action exceeds the justice's jurisdiction, his proceedings therein are void; Geyger v. Stoy, 1 Dal. 135. In Collins v. Collins, 37 Pa. 387, where the verdict of the jury was for $146.00 in favor of the plaintiff and it was evident that the amount in controversy was in reality over $100.00, although the justice of the peace had given judgment for only $36.26, the verdict was set aside upon the ground that the justice of the peace, from whose judgment an appeal had been taken, had no jurisdiction because the amount was over $100.00. Here we are asked to treat the case as though $2500 00 was the amount in controversy. If the amount sued for was not more than $300.00, a verdict for a larger amount, owing to the accruing of interest pending litigation, would be sustained; Collins v. Collins supra. and Trego v. Lewis, 58 Pa., 463. But we are not asked to permit the amendment to be made so as to lay the damages at $2500.00 because of accruing interest. We are asked to allow the amendment, because since the bringing of this suit, nearly fifteen years ago, the "defendant continued trespasses upon the land of the plaintiff by cutting and removing trees on said land." "Cutting and removing trees," after the commencement of this action,did not constitute "continued trespasses" for which damages may be recovered under the Act of 1876, supra. The damages meant by that Act are those of a continuing nature and for which a "second action might be brought * * * after service of writ, but the right to which would be determined by the verdict in the first suit;" Hileman v. Hileman, 172 Pa. 323. "Wrongs which, from their very nature, are perpetrated at only distinct and rare intervals, are not within the meaning of the Act." *Ibid*, "even though they be trespasses of the same kind;" Pantall v. Coal and Iron Company, 204 Pa. 158; Tuston v. Sammons, 23 Superior Court 175.

This action was begun to recover damages resulting from the cutting of certain trees, prior to the commencement of the action, and the value of those trees fixes the basis for ascertaining the amount of damages in this case. The language of Chief Justice Dean in Hileman v. Hileman, supra., seems

to apply here. "Suppose, instead of establishing a distillery permanent in its character, defendant had dumped into this stream the contents of an outhouse vault, the right of the plaintiff would have been violated; they might have repeated the wrong, but it would not have been the case intended by this act; such a trespass, if held to be within the act, would possibly result in an absurd condition; plaintiff having failed to prove any wrong, before suit brought might, nevertheless, clearly prove one after; we then would have to sustain an action brought without cause and a verdict for a wrong committed thereafter."

The rule is discharged.

C. P. of Allegheny Co.

Watson v. Pittsburg Coal Company.

Workmen's Compensation—Misdemeanor—Violation of Act of June 9, 1911, P. L. 756—Dependent Widow—Liability of Employer.

Where, on appeal from an award of the Workmen's Compensation Board allowing compensation to the widow of an employe killed in a coal mine, liability is sought to be avoided on the ground that death was self-inflicted and intentional, the burden is on the employer, and when that burden is not met, death will be presumed to have been accidental, and the appeal should be dismissed.

The fact that an employe in a coal mine was killed by the explosion of a lamp which he was filling with explosive oil brought into the mine contrary to the Act of June 9, 1911, P. L. 756, which makes such an act criminal and a misdemeanor, will not relieve the employer from being compelled to compensate decedent's dependent widow, as the Workmen's Compensation Act of June 2, 1915, P. L. 736, makes no distinction in the degrees of negligence, and, being remedial legistion, should be broadly and liberally construed.

In re-appeal from the award of the Workmen's Compensation Board.

Acheson & Crumrine, for claimant.

Johnston & Rose, for defendant.

April 26, 1917. DAVIS, J.—This is an appeal from the decision of the Workmen's Compensation Board awarding compensation to Mary Watson, widow of David Watson, who met his death while in the employment of the defendant company. The facts were agreed upon between the claimant and the defendant company and submitted to the Compensation Board to determine whether or not the manner of death of the said Watson entitled the claimant to compensation under the provisions of the Act of June 2nd, 1915, P. L. 736. The Board has condensed and found from this agreement the following facts, viz.:

"David Watson, the deceased husband of the claimant, was employed by the defendant company as a driver in one of its mines. At the time of the accident he was engaged in filling his lamp, which was an ordinary open driver's lamp attached to his cap, and was lighted and burning. That the deceased was filling his lamp with crude oil or petroleum, an explosive oil, which he himself had procured from a source outside the mine and had taken into and secreted in the mine. That whilst thus engaged in filling his lamp, an explosion occurred in which he was so badly burned that he died the next day as a direct result of the injuries sustained, leaving to survive him only one dependent, his widow, the claimant."

From these facts the Board determined ae a finding of fact that David Watson's death was the direct result of an injury occurring in the course of his employment, and as a conclusion of law that his death was accidental, and that the claimant is entitled to compensation under the provisions of said compensation act.

The defendant appeals from the decision of the Board, alleging that the Board erred in so holding, on the ground that the deceased had violated the provisions of Sections 2 and 3 of Article XVII of the Bituminous Mining Act of June 9, 1911, P. L. 756, which provides as follows:

"Section 2. No explosive oil shall be taken into or used in any mine for lighting purposes, except when used in safety lamps * * * ."

"Section 3. All oils and materials used in open lamps shall be non-explosive * * * ."

Also citing Section 2 of Article XXVI of the same Act, page 831, which provides:

"Any person who neglects or refuses to perform the duties required of him by this Act, or who violates any of the provisions or requirements thereof, shall be deemed guilty of a misdemeanor, and shall upon conviction thereof * * * be punished by a fine not exceeding two hundred dollars, or imprisonment in the county jail for a period not exceeding three months, or both, at the discretion of the court."

The question of the legal liability of the defendant under the undisputed facts has been passed upon by the Board from a number of stand-points, and we see no reason to disagree with any of the conclusions reached by the Compensation Board.

The grounds urged by the defendant upon which legal liability should be denied are that the injury was caused by the defendant's violation of an Act of Assembly, and that his death should be held to be self-inflicted and not accidental. There is no presumption that the deceased intended to cause the explosion which resulted in his death. The accident might have been caused by his thoughlessness, lack of knowledge or stupidity rather than any actual realization of the probable consequences of his act. Without any evidence, we are of the opinion that the latter is the more reasonable inference and that the death of the deceased should be classed as an accidental one.

Another ground is urged as a reason why compensation should not be awarded, that the deceased had committed a criminal act and compensation should not be allowed on the ground of public policy. There might be a great deal of force in this position if the person who was injured was seeking to recover for himself and had knowingly violated an Act of Assembly. The Compensation Act is a highly remedial statute rendered necessary for the protection of the laboring classes by reason of the great number of accidents in the use of rapid moving and dangerous machinery of all kinds in manufacturing or other industries where labor is employed. The Act should be broadly and liberally construed, for it not only provides for the workman who is injured, but for those who, in case of his death, were dependent upon him.

Section 301 of the Act provides:

"When employer and employe shall by agreement, either express or implied, as hereinafter provided, accept the provisions of Article III of this Act, compensation for personal injury to, or for the death of, such employe, by an accident, in the course of his employment, shall be made in all cases by the employer, without regard to negligence, according to the schedule contained in Sections 306 and 307 of this Article; provided that no compensation shall be made when the injury or death be intentionally self-inflicted, but the burden of proof of such fact shall be upon the employer."

The Legislature has created a liability for personal injury or death by accident in the course of employment without regard to negligence. It has used the word negligence in its broadest sense. It has not undertaken to draw any distinction between the degrees of negligence, whether ordinary, gross or criminal. There is no reason why the Court should read into the Act that which the Legislature has not done. The Legislature has further expressly designated its intention when it says that to bar compensation the injury shall be self-inflicted and shall be done intentionally and that "the burden of proof of such fact shall be on the employer." The burden of proof has not been met by the defendant in this case, and its appeal should be dismissed and the award of the Compensation Board affirmed.

C. P. of Cumberland Co.

Daron v. Prudential Insurance Co. of America et al.

Attorney-at-Law—Filing Warrant of Attorney—Service of Process on persons in Military or Naval Service—Attachment Execution.

An appearance by an Attorney-at-Law is presumed to be authorized, and the burden is on the party attacking his authority to apply for a rule to show cause why he should not be required to file his warrant under Section 71, of the Act of April 14, 1834, P. L. 333.

An attachment exection is civil procees within Section 60, of the Act of April 9, 1915, P. L. 80, which provides that "no civil process shall issue or be enforced against any person mustered into the service of this Commonwealth or of the United States during so much of the term as he shall be engaged in active service under orders, nor until thirty days after he shall have been relieved therefrom," and cannot issue while the defendant is in active service, although service of the writ be made on the garnishee only for the purposes of acquiring a lien and no effort be made to serve the defendant personally.

Rule to dissolve attachment.

J. Harvey Line and *H. Berg*, for rule.

W. A. Kramer, contra.

April 3, 1917. SADLER, P. J.—On March 1, 1913, W. A. Adams executed a judgment note in favor of the plaintiff. The same was entered for the balance remaining due thereon, to wit, $304, on Aug. 9, 1916. Subsequently an attachment execution was issued in which the defendant was named, and the Prudential Insurance Company of America was summoned as garnishee. No attempt was made to serve the former, as

appears by the return of the sheriff, but a proper return was made as to the latter. Subsequently interrogatories were filed with leave of court, and answers filed, which remain undisposed of.

On July 9, 1916, Adams was mustered into the service of the Government, and remained in the same until Feb. 28, 1917. An appearance was entered for him on Jan. 18, 1917, and the next day a petition was presented, praying for a rule to show cause why the attachment should not be dissolved and the proceedings stricken from the record by reason of their institution while the defendant was engaged in military service. An answer was filed denying the right to such action. Depositions were taken on both sides, and the questions involved submitted after argument.

The first question raised is based on the alleged lack of authority on the part of counsel for the defendant to institute the present proceeding. The petition for the rule was presented by a member of the bar, who had entered his appearance in the case in the office of the Prothonotary. "An Attorney-at-Law is an officer of the court in which he is admitted to practice. His admission and license raise a presumption *prima facie* in favor of his right to appear for any person whom he undertakes to represent. When his authority to do so is questioned or denied, the burden of overcoming this presumption in his favor rests on him who questions or denies his authority;" Danville, H. & W. R. R. Co. v. Rhodes, 180 Pa. 157.

If it is desired that a warrant of attorney be filed, it can be compelled as provided by the Act of April 14, 1834, §71, P. L. 333. But this requirement is to be enforced by a preliminary rule to be allowed by the court; Com. v. Serfass, 5 Pa. C. C. Reps. 139. It is based on a sworn affidavit which shows the existence of facts which tend to overcome the presumption that the attorney is authorized; Danville, H. & W. R. R. Co. v. Rhodes, 180 Pa. 157. To such petition an answer can be filed and an issue raised; McAlpine Street, 40 Pa. Superior Court 268. If the proper practice had been complied with, it becomes the duty of the attorney to file the warrant required by the act, and mere consent shown by letters or otherwise will not be accepted in lieu thereof; Fisher v. Reach, 202 Pa. 74. (In this case it appeared that the warrant of attorney could not be filed, as the interest involved had been parted with.)

In the present case, not only was there a presumption of the right to appear, but ample evidence to justify this conclusion and a ratification of the acts done. The same can be said of the associate counsel who appeared. Though the client cannot be held liable for services performed by a second attorney employed by the first without consent; (Hewes v. Transportation Co., 31 Pa. C. C. Reps. 73,) yet the employment, as in this case, may be ratified by the client.

The real contention before us is found in the objection to the issuance of the attachment execution while Adams was employed in the service. The National Guard Act of April 9, 1915, § 60, P. L. 80, directed that no civil process should issue against any person mustered into service while so engaged, or for thirty days thereafter. This provision is taken from the Act of April 18, 1861, § 4, P. L. 408, and is carried, in turn, into the Act of April 13, 1887, § 127, P. L. 23, the Act of April 28, 1899, § 59, P. L. 133, and the Act of May 5, 1911, § 60, P. L. 131.

The exemption provided has been applied in the case of a *scire facias sur* mortgage (Coxe v. Martin, 44 Pa. 322; Drexel v. Miller, 49 Pa. 246; Land Title & Trust Co. v. Rambo, 174 Pa. 566,) and to a writ of *levari facias;* Breitenbach v. Bush, 44 Pa. 313. Is the same true where the writ is one of attachment exection? An attachment execution is an execution process; Stranahan v. Stranahan. 146 Pa. 44; Kennedy v. Agricultural Insurance Co., 165 Pa. 179. It must be directed to the defendant, who must be called in, as well as to the garnishee; Act of June 16, 1836, § 36, P. L. 755. And must be served upon him, except where he is a non-resident, before judgment is taken against the garnishee, so that he may interpose any proper defense; Corbyn v. Bollman, 4 W & S. 342; Carter v. Wallace, W. N. C. 63; Cunningham v. O'Keefe, 3 Pa. C. C. Reps. 471.

It is suggested that though the defendant is a necessary party to the writ of attachment execution, yet one of the purposes is to secure a lien upon his goods in the hands of the garnishee, and that this may be done by service on the latter, though no judgment could be obtained until the defendant is properly brought in—here more than thirty days after military service is ended. It will not be questioned that the mere entry of the judgment is not such process as is prohibited by the Act of 1915. But is the same true

where the effort is to secure the lien against the personal property in the hands of a third party? We think not. The attachment is merely an "auxiliary to the old modes of execution." It is a collateral process to the regular action between the plaintiff and defendant; Kase v. Kase, 34 Pa. 128. "It is, therefore, mere execution process, so far as the debtor is concerned. The *scire facias* to the garnishee is auxiliary to the execution, and designed only to accomplish the execution purposes of the process. As between the creditor and debtor, it is as essentially an execution as a *fieri facias*, and the proceedings under it are a levying an execution as truly as the seizing of goods under a *fieri facias*;" Strouse's Executor v. Becker, 44 Pa. 206. See, also, National Bank of Spring City v. Bank of Pottstown, 11 Montg. Co. Law Repr. 64. It is a double process against the defendant and collaterally against the garnishee; McDonald v. Stear, 7 Dist. R. 190.

If these views are correct, and they are well supported, we must hold the attachment execution is a civil process within the meaning of the Act of 1915, though no effort was made to serve the defendant personally. The case falls within the terms of that legislation, and the defendant cannot be deprived of the exemption given by indirection; Davidson v. Barclay, 63 Pa. 406. The process in this case could not have issued solely against the garnishee, but must be primarily against the defendant to acquire rights against the former. As the issuance of any such writ against him was forbidden, the whole proceeding must fall.

The rule is made absolute, and the attachment is dissolved and proceedings dismissed, at the costs of the plaintiff.

C. P. of Northumberland Co.

Schweitzer et. al. v. Reichert et. al.

School code—School board—Discretion—Building—Injuncnion.

The necessity for the erection of a school building and its size and style are matters within the sound discretion of the directors, with the exercise of which the court will not interfere by injunction except in cases of a clear abuse of such discretion.

Under the Act of May, 1911, commonly called the School code, the directors have a discretion to award a contract to a person not the lowest bidder, if in their judgment the person to whom the contract was awarded was the best bidder; this discretion is reviewable only when the directors act arbitrarily, capriciously or fraudulently.

Bill in Equity for an injunction.

Lloyd and Kopyscianski for the Plaintiffs.

L. S. Walter, A. G. Shoener and *A. L. Snyder* for the Defendants.

June 26, 1916. MOSER, J.—After a careful perusal of the testimony adduced in this case, and, having examined the authorities submitted by counsel, we have concluded that no good cause has been shown, nor any good reason given, why the preliminary injunction should be continued and made permanent.

There was no intimation of fraud in the transaction complained of; there was no proof of any conduct on the part of any member of the board that was fraught with the least suspicion. Each step leading to the consummation of the contract was taken only after a free and frank discussion of the various propositions encountered and presented to the board as their work progressed. At least some members of the board made considerable investigation before deciding upon the kind or character of building that was finally adopted. Due and legal advertisement was given and there was open and fair competition in the bidding. The testimony disclosed no irregularities whatever in the letting, but the complaint is that the contract was not awarded to the lowest bidder. When we consider the size and importance of the contract and work, it cannot be said that the difference between the lowest bid and that of the successful bidder, as disclosed by the testimony, was so large a sum as to color the letting with irregularities or fraud, or to make the same illegal.

The code provides that contracts involving large sums of money shall be awarded to the lowest and best bidder. The school directors, who were called as witnesses, declared, that, in their judgment, the contract was given to the best bidder. From their testimony it appears that, at the time the board took action in the matter, it was the judgment of that body that the best bidder was the one to whom the contract was awarded. Various reasons were givin by the board members for their decision in the premises. Under those circumstances the judgment and discretion of the School Board prevails unless it can be shown that the directors acted arbitrarily, capriciously or fraudulently; Commonwealth v. Mitchell, 82 Pa. 343; Lamb v. Redding, 234 Pa. 481.

The size and style of the building is likewise a matter for the sound discretion of

the school board. The court has no right to interfere, except perhaps where there is a violent or arbitrary abuse of discretion. No such condition has been established in this case, nor do we think there is sufficient merit in the remaining complaints advanced by the plaintiffs to warrant the chancellor in continuing the injunction.

The preliminary injunction is hereby dissolved and the bill dismissed at the cost of the plaintiffs. Unless exceptions are filed hereto within ten days, counsel for defendants is directed to prepare and present a final decree in accordance herewith.

C. P. of Lackawanna Co.

Allen v. Nichter.

Evidence—Immateriality—Introducing collateral issue.

On a suit to recover balance owing by defendant on his purchase of plaintiff's interests in a certain company, where the amount of defendant's down payment is in dispute, and it is shown that defendant, in a letter written to R, whose interests in the same company he had also purchased, admitted the down payment to be as alleged by plaintiff, an offer by defendant to prove that the letter was so written at plaintiff's instance in order to deceive R, is objectionable both on ground of immateriality and also as tending to introduce a collateral issue.

That defendant at the time of his purchase borrowed money sufficient to make such down payment as he alleged, is irrelevant, when plaintiff was neither a party nor privy to the transaction.

Motion for new trial.

J. F. Bell and *J. L. Morris*, for Plaintiff.

W. J. Douglas, for Defendant.

June 14, 1917. NEWCOMB, J.—There was a verdict for plaintiff in assumpsit for the balance owing by defendant on his purchase of plaintiff's interest in an enterprise called the Anthracite Granolithic Separating Company, for the consideration of $1,150. The single question at issue as defined by the pleadings was the amount of the down payment. By plaintiff it was alleged to have been $350; by defendant, $1,142. Thus defendant admitted a balance of $8, while plaintiff's claim was $800.

The date of sale was 10th November, 1908. To secure the balance a judgment note was then and there given by defendant which has become lost. In the meantime judgment d. s. b. had been entered upon it in the sum of $800, which was afterwards stricken off on defendant's motion for variance. That is to say: While the figures $800 appeared in the proper place, the words in the body of the note are "Eight" dollars,due, as plaintiff says, to mere clerical omission in filling up the blank form.

One of the reasons now assigned for this motion involves a point contested at the trial, viz: the question whether the suit proceeds technically on the note, thus casting upon plaintiff the burden of reformation. That can best be answered by reference to the statement itself, and no reason appears for changing the view expressed at bar that the true cause of action pleaded is the breach by vendee of an executed contract of sale, to which the note was related only as collateral security. This is believed to be so self-evident on inspection of the pleading that dis cussion would be quite superfluous.

The motion has been entertained only for the purpose of reviewing an adverse ruling on an offer of evidence by defendant.

He stood confronted with an admission in writing that the transaction was just what plaintiff said it was. This was his letter of December 6, 1908,to one Reynolds, whose interest in the company he had bought out along with that of plaintiff. He wrote to solicit Reynolds' assistance in disposing of his holdings at anything above what it had cost him. He referred to the transaction now in question and, *inter alia*, to the cash payment of $350 to plaintiff with a note for $800.

It was then offered to prove by him on his own behalf that the letter was so written at the instance of plaintiff in order to perpetrate a deception upon Reynolds. On objection the offer was excluded as an attempt to avoid the writing by showing his own turpitude.

It is to be borne in mind that he was accorded the privilege of denying the truth of his writing. That is not the point at stake. The question is whether it was his further privilege to make proof of his dishonest motive. Had the letter induced action by Reynolds to his own prejudice in a matter giving rise to a suit by him against this defendant, no doubt the objection would be well taken by Reynolds. As between the present parties on an issue for which the writing was in no sense responsible, the validity of the objection on that specific

ground is not entirely clear. The offer would, however, seem to be objectionable both on the general ground of immateriality and also as tending to introduce a collateral issue.

However, while the question is not without interest, its practical importance disappears here in light of the fact that in substance defendant had already testified to the same thing on cross-examination at an earlier stage of the trial and he had the benefit of it in the charge. The attention of the jury was called to his explanation of the letter, with the instruction that it was entitled to their fair and impartial consideration in passing upon the decisive question, viz: the personal credibility of the opposing witnesses. That summed up the whole controversy and is believed to have been all that defendant could ask.

The issue was in the narrowest possible compass; the verdict is believed to be in accordance with the credible evidence, and it should not, therefore, be disturbed.

The motion is denied and the rule to show cause discharged.

ORPHANS' COURT

Brockley's Estate

Decedents' Estates—Claims Against—Competency of Witness — Practice before Auditors.

Claimant testified to services rendered by herself and minor children to decedent during her lifetime. HELD, that her testimony should have been promptly rejected by the Auditor, as she was clearly incompetent.

Evidence objected to should ordinarily be admitted or rejected at once by the auditor, so that counsel offering it may know whether or not to offer other similar evidence, and objecting counsel whether or not to cross-examine the witness.

If objections to her testimony had been deferred until after the close of the testimony, or to the argument of the exceptions, when the claimant might not have been able to substitute other evidence for her own testimony, they could not then have been sustained to her prejudice.

Testatrix's statements to several physicians that claimant should receive something for what she had done were too indefinite to establish a contractual relation.

The exceptions must be dismissed, because without the claimant's own testimony the evidence is clearly insufficient to establish her right to recover anything more than what was awarded her by the Auditor.

Even admitting her testimony, as the Auditor did, his findings of fact, on which he based the rejection of this claim, are not so clearly erroneous as to justify the Court in sustaining the exceptions.

Exceptions to Auditor's report.

Ehrehart & Bange for exceptions.

T. F. Chrostwaite, contra.

August 27, 1917. WANNER, P. J.—This auditor's report is objected to because he rejected the claim of Agatha C. Brady for wages of herself and certain of her minor children for various domestic services, successively rendered by them separately, which it is alleged amounted to a practically continuous service, from the death of the testatrix's husband on the 17th day of December, 1913, to the death of the testatrix herself, on the 17th day January, 1916.

There was no evidence of any specific contract, verbal or written, for said services, or of any payment or demand for payment of the same, in the lifetime of the testatrix, and claiments right to recover for the services of her minor children, was based upon an assignment of the same to her by her husband, subsequent to the testatrix's death.

The testatrix, Mary A. Brockley, had been taken into the family of the claimant's parents when she was a child, and she and the claimant were raised practically as sisters, although there seems to have been no legal adoption of the testatrix. She lived near to the residence of Agatha C. Brady in the Borough of Hanover, during the period of the rendition of these services. Similar services had been rendered by the claimant and her minor children during the lifetime of testatrix's husband, for which no payment had ever been made, and for which no claim for payment was presented against his estate.

Some difficulty in disposing of these exceptions grows out of the somewhat inaccurate record of the rulings of the auditor at the taking of the testimony in the case. Some objections to evidence offered do not seem to have been specifically ruled upon at all, either at the taking of the testimony or in the auditor's report. The question of the competency of the claimant as a witness in her own behalf as to matters occurring in the lifetime of the testatrix was reserved by the auditor, when objections to it were made. She was held competent in his report, because her cross-examination made subsequent to the objection, covered new matters happening in the lifetime of the testatrix, which the witness had not testified to in chief.

Other rulings entered on the transcript of the testimony, apparently were not made

at the taking of the testimony, but subsequently, in preparing the auditor's report.

Similar irregularities and omissions on the part of the auditor were held, in the Hoke Estate, 29 YORK LEGAL RECORD 128, to require the re-commitment of the auditor's report for specific rulings on all objections to evidence. In this case it is unnecessary to recommit because of the legal conclusions reached by the Court.

At the hearing of contested claims against decedents' estates before auditors, the rules of evidence should be applied in the same manner as at trials in the Court of Common Pleas.

Evidence objected to should ordinarily be admitted or rejected at once by the auditor, so that counsel offering it may know whether or not to offer other similar evidence, and objecting counsel whether or not to cross-examine the witness.

If, for exceptional reasons, the question raised by the objection is reserved for a later ruling, it should be so stated on the stenographer's notes; for when the objection is to the competency of the witness, the cross-examination is made subject to the objections, and both it and the examination in chief should be rejected if the objection is subsequently sustained; DeSilver's Estate, 32 Pa. Supr. Ct. 174.

In this case the testimony of the claimant should have been promptly rejected by the auditor because she was clearly incompetent to testify under clause "e", Sec. 5, of the Act of May 23rd, 1887, P. L. 158.

But, having reserved the question, he should in his report, have rejected her entire testimony as to matters occurring in testatrix's lifetime.

It will be noted that the first objection was made soon after the claimant took the stand, when first called to testify in her own behalf and is was renewed each time she was recalled for the same purpose.

Though the objection when first made was not as specific as when subsequently renewed, it sufficiently appears from the notes of testimony and the auditor's report and also from the argument of the exceptions in court, that all parties understood and treated it as an exception to the competency of the claimant. If the objection had been deferred until after the close of the testimony, or to the argument of the exceptions, when the claimant might not have been able to substitute other evidence for her own testimony, it could not then have been sustained to her prejudice.

This case is not ruled by Clad's Estate, 214 Pa. 141, and similar cases, in which the claimant did not testify in chief, as in this case, to matters occurring in decedent's lifetime, but was rendered competent by being first cross-examined as to those matters, by the other side.

The evidence remaining in the case after the rejection of claimant's own testimony is clearly insufficient to establish her claim.

The testatrix's statements to several physicians to the effect that claimant was to receive something for what she had done for her were not made in the presence of the claimant and were too indefinite to establish a contractual relation between her and the testatrix. They could not at any rate be construed as a promise of payment to claimant for the services of the children, to which the husband alone was then entitled.

Neither claimant's children nor her husband were called to testify in support of this claim. Though it is true the latter would have been incompetent, the calling of claimant herself who was equally incompetent, justifies the inference that the others would also have been called if they could have established the material facts of claimant's case.

The question of fact whether the services were rendered in expectation of a legacy, or were meant to be gratuitous, were fully considered by the auditor, and in ruling the case on somewhat more technical grounds than he did, we do not wish to be understood as holding that he clearly erred in rejecting this claim on all of the evidence presented.

As we have seen, the claimant's own testimony is absolutely necessary to establish her case. Her credibility and the weight to be given to her testimony under all the facts and circumstances of the case was primarily for the Auditor to determine. His opportunity to judge of those matters from observation of the parties and their witnesses was so much better than that of the Court from the written evidence alone, that we could not disturb his findings unless we were convinced that he was clearly wrong in his conclusions.

The exceptions to the Auditor's Report are dismissed and the same is finally confirmed.

O. C. of Berks Co.

Stepp's Estate

Wills—Bequest—Construction of Words "die without heirs."

Decedent, prior to his death, received payment of a legacy, from the estate of his step-brother under the following clause of the latter's will: "I give and bequeath to my step-brother, James S. Stepp, the sum of $400. The above sum to be paid to him within one year after my decease, and should he die without heirs the above sum shall fall back to the children of my son John H. Stepp." Decedent died without children, and the heirs of John H. Stepp claimed the amount of the legacy out of his estate. HELD, that the words "die without heirs" must be construed to mean death without heirs during the lifetime of the testator, and that decedent took the legacy unconditionally.

HELD, also, that the words "to be paid within one year after my decease," referred merely to the time of payment in case decedent should survive the testator, and that decedent took the legacy unconditionally.

Claim of children of John H. Stepp.

Adam B. Ricser, for claimants.

John B. Stevens for accountant.

SCHAEFFER, P. J.—The account contains the proceeds of personal estate, and shows a balance for distribution of $3,873.42.

Against this balance there was presented a claim of $400, with interest, by David R. Stepp, Mahlon R. Stepp, Katharyn Reist, Sara Himmelberger, Esther Oese and Howard R. Stepp, children of John H. Stepp, deceased. John H. Stepp was a son of David Stepp, deceased, under the provisions of whose will the claim arises.

David Stepp, who was a step-brother of James Stepp, the decedent here, died testate on June 26, 1886, and in his will dated July 16, 1881, which was duly probated on the 26th day of July, 1886, and recorded in the Register's office, in Will Book No. 15, page 557, provided inter alia, as follows:

"Item.—I give and bequeath to my step-brother James S. Stepp the sum of four hundred dollars. The above sum to be paid to him within one year after my decease, and should he die without heirs the above sum shall fall back to the children of my son John H. Stepp."

A release offered in evidence shows that the sum of four hundred dollars, in pursuance of the aforesaid item, was paid by John Stepp, the executor of David Stepp, to James Stepp, the decedent in this case.

The children of John Stepp now contend that they are entitled to this bequest of $400.00, because at the death of James Stepp, who died without children on January 4, 1915, it vested in them under this provision in the will of David Stepp, which provides that the sum of four hundred dollars should go to the children of John H. Stepp if James S. Stepp should die without heirs.

We are of the opinion that the legatee, James Stepp, became entitled absolutely to this legacy of $400.00 at the death of David Stepp: for the general principle is laid down that the words "and should he die without heirs" must be construed to mean death without heirs during the lifetime of the testator. Thus, in Mickley's Appeal, 92 Pa. 514, Chief Justice Sharswood says: "It is very clearly settled, both in England and in this state, that if a bequest be made to a person absolute in the first instance, and it is provided that in the event of death, or death without issue, another legatee or legatees shall be substituted to the share of legacy thus given, it should be construed to mean death without issue before the testator." This principle is illustrated by very many subsequent cases, and will control in the construction of bequests such as the one in question, unless the will affords clear evidence of the contrary intent, that the first taker is referred to or treated as living at a period subsequent to the death of the testator; Jessup v. Smuck, 16 Pa. 327; Stoner v. Wunderlich, 196 Pa. 168; Daniel's Estate, 27 Sup. Ct. 358.

Counsel for the children of John Stepp argued that the words "The above sum to be paid to him within one year of my decease," show that the testator David Stepp contemplated that his stepbrother James Stepp would survive him, and that the event of his dying without heirs would occur after the death of the said David Stepp. We do not think that these words take the case out of the general rule. They merely refer to the time of the payment of the legacy in case James Stepp should survive the testator, but do not designate any period or fixed time when or within which he should die without heirs. The time is annexed to the payment of the legacy, and this supports the view that James Stepp took the bequest of $400.00 absolutely at the death of David Stepp. "The legacy shall be deemed vested or contingent just as the time shall appear to have been annexed to the gift or the payment of it;" Moore v. Smith, 9 Watts 403, Smith's Estate, 226 Pa. 304.

The claim of the children of John Stepp is disallowed.

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COMMON PLEAS

C. P. of Northampton Co.

Bednar's Admr. v. Prudential Insurance Co.

Life insurance—Contradiction of statements in application.

In an action on a policy of life insurance, where the defendant sets up alleged false answers as to the excessive use of spirituous liquors, and as to prior diseases, and as to the attendance of a physician, and all these facts are contradicted by witnesses who knew the decedent, and were in a position to know the facts as to his use of liquors, and as to his health, the case must be submitted to a jury.

Herbert J. Hartzog and *J. Davis Brodhead*, for the plaintiff.

Parke H. Davis, for the defendant.

December 11, 1916. STEWART, P. J.—This is a motion for judgment *non obstante veredicto*. In the leading case of Delmas v. Kemble, 215 Pa. St. 410, it was held: "Under the Act of April 22, 1905, P. L. 286, which gives the court authority to enter judgment *non obstante veredicto* where a request for binding instructions has been declined at the trial, the court cannot enter judgment against the verdict, where there was a conflict of evidence on a material fact, or any reason why there could not have been a binding direction." The same rule is also well stated in Strawbridge v. Hawthorne, 47 Pa. Supr. Ct. 647, as follows: "In determining as to the correctness of a judgment *n. o. v.* under the Act of April 22, 1905, P. L. 286, the test is whether binding direction for the defendant would have been proper at the close of the trial. In applying the test, the plaintiff must be given the benefit of every fact and inference of fact pertinent to the issue. which the jury could legitimately find from the evidence before them." These cases have been followed in a great many cases. See Wetzel v. Pittsburg Rys. Co., 55 Pa. Supr. Ct. 22; Shannon v. McHenry, 219 Pa. St. 267; Danko v. Pittsburg Rys. Co., 230 Pa. St. 295; Duffy v. York Haven W. & P. Co., 233 Pa. St. 107; Hobel v. M. & S. Ry. & Light Co., 233 Pa. St. 450; and Page v. Moore, 235 Pa. St. 161. We must, therefore, see whether there were facts in dispute. The defendant company defended on the following answers in the application, which it said were untrue. "What quantity of (daily average) If not daily, what average? Malt Liquors? 1 or 2 a day Wines? None Spirits? None. Have you ever used malt or spirituous liquors to excess? (If yes, give full particulars.) No Have you ever had—(answer Yes or No.) Asthma? No Habitual Cough? No What physicians have attended you during the past three years, on what dates and for what complaints? None Are you now in good health? Yes." This was followed by a signed declaration as follows: "I HEREBY DECLARE that all the statements and answers to the above questions are complete and true, and I agree that they shall form a part of the contract of insurance applied for," &c. The application was signed on the 18th of July, 1913. The defendant introduced testimony to show that on several occasions the decedent had been drunk. Defendant also introduced testimony to the effect that he had consulted a doctor on the 7th of June, 1913, and that that doctor thought he had chronic asthma and an habitual cough. The doctor was uncertain as to whether he had told him what he was suffering with, but he advised him to stop drinking. He also gave him a prescription, which, however, did not indicate whether it was to be for the decedent or a member of his family. The plaintiff, in answer to defendant's case, pointed to the testimony of some of the defendant's witnesses who knew the decedent well, and were not able to say that he used liquors to excess, and to the decedent's daughter, who testified that she lived at home, and that he had always been in good health, and that he did not complain of anything in June or July, 1913, and did not take any medicine, and was not attended by any doctor prior to his last illness, and that he did not use liquor to excess, and to the testimony of Mr. Cyphers, who knew him for over ten years, and saw a great deal of him in 1912 and 1913, and that he appeared to be in good physical condition, and that he never knew him to take medicine, or never heard him cough or wheeze, and that he never saw him under the influence of liquor, and to the testimony of Dr. Swoyer, who had been the insurance company's physician for thirty-two years, and who discovered no signs of habitual cough,

or other disease about him on the 18th of July, 1913, when he made his examination. He also said that he could not have had that cough because if he had had, he would have coughed when he (Dr. Swoyer) was examining him. Upon the subject of drunkenness we charged strongly in defendant's favor. Subsequent reflection has left us in doubt as to whether it would be the duty of the applicant to give the occasions when he was drunk, if they were only a few instances. That question must, we think, refer to the habitual excessive use of liquors. As all the questions were in dispute under the testimony, they had to be referred to a jury. In our judgment, it rarely happens that a case is so similar as the present case is to the following cases. In Clark v. Metropolitan Life Ins. Co., 62 Pa. Super. Ct. 192, it was held: "In an action on a policy of life insurance where the plaintiff presents a *prima facie* case, and the defendant set up false representations as to health in the application, the testimony of a physician which is directly contrary to the statement in the application, is not necessarily to be believed, although it is uncontradicted, and the case must be submitted to the jury to pass upon the credibility of the witness. The condition of health of an insured at a particular time is usually, and almost necessarily, a question of fact to be submitted to the jury under propor instructions." In that case the position of Dr. Golden is precisely like the position of Dr. Glick in the present case. On page 196 it appears that "in rebuttal the plaintiff called a number of persons who mingled in the daily life of the girl, at and about the time the policy issued, and they all testified she appeared to be in ordinary health and exhibited no signs of being seriously ill." In the present case that also, was done. In Rigby v. Metropolitan Life Ins. Co., 248 Pa. St. 351, it was held: "The case was for the jury in an action upon a policy of life insurance where it was alleged that deceased falsely stated in his application for a policy that he had not consulted a physician, other than his family physician, within a certain period, but the evidence as to whether he had consulted such a physician was in conflict. In such case where defendant offered evidence to show that decedent had consulted another physician for certain ailments and gave evidence as to his physical condition during that period, it was competent for plaintiff in rebuttal to prove that during the period in question the health of deceased was good and that he did not exhibit the symptons described." In the Rigby case the doctor testified that the decedent had called on him six different times, and as tending to corroborate him, just as in the present case, the keeper of a drug store was called, who produced two prescriptions, which were much stronger than in this case because on them was written the name "Mr. Harry Rigby," which was the decedent's name. In rebuttal fifteen witnesses were called, whose testimony was of the same kind as in the present case. In Oplinger v. N. Y. Ins. Co., 253 Pa. St. 328, the application contained the same questions as to diseases and as to attending physicians. We admitted testimony of the same kind as in the present case and the verdict was affirmed by the supreme court. In each of these cases reference is made to other cases which support them. We do not think it necessary to refer to other authorities, as those cited are, in our judgment, conclusive.

Motion for judgment *non obstante veredicto* is refused, and rule is discharged, and judgment is directed to be entered on the verdict in favor of the plaintiff upon the payment of the jury fee, and the evidence taken upon the trial is certified and filed and made part of the record.

C. P. of Allegheny Co.

Sutmeyer et al. v. Thornton

Landlord and Tenant—Use and occupation—Compensation for—Partition—Notice—Assumpsit.

In an action in assumpsit by two heirs of an estate against one who had occupied part of a building for several years under a lease with all the heirs for an adjoining building, it is no defense to claim that he received no notice and knew nothing of a partition proceeding whereby the real estate of an estate had been apportioned and the plaintiffs had been awarded the property for which a claim was made since the partition, and a verdict for plaintiff will not be disturbed.

The owner of real estate is not estopped from recovering compensation for use and occupation because he has not notified the one who is occupying it to pay his rent.

Motion for Judgment *n. o. v.* and New Trial.

J. E. Little and *W. L. McConegly* for plaintiffs.

Geo. H. Calvert, Geo. B. Berger and *Donald Thompson* for defendant.

March 9, 1917. EVANS, J.—As stated by counsel for the defendant in his brief, "there are substantially no disputed facts."

On the 8th of February, 1907, the defendant with a man by the name of Carlton leased from the heirs of Henry Sutmeyer, among whom were the plaintiffs in this case, "all that certain building situate at No. 901 Federal Street, Allegheny, Pa." The building situated at No. 901 Federal Street, Allegheny, Pa., was known as the Hotel Federal, and at the date of this lease and for sometime prior thereto a room on the second floor of No. 903 Federal Street, also the property of the heirs of Henry Sutmeyer, had been used in conjunction with the building at No. 901 Federal Street as part of the Hotel Federal. The lease of February 8, 1907, was to begin the 1st of May of that year and continue for one year. The defendant, who shortly after the 1st of May, 1907, became the sole lessee of the premises, continued to occupy under this lease for the years 1908 and 1909. In July of 1909 the estate of Henry Sutmeyer was partitioned and the premises at No. 901 Federal Street were partitioned to Eliza Young and Flora E. White, daughters of Henry Sutmeyer, and the premises at No. 903 Federal Street were alloted to the plaintiffs. The lease dated February 8, 1907, was signed by all of the heirs of Henry Sutmeyer, or by their personal representatives, including the two plaintiffs in this case. The defendant occupied the room on the premises known as No. 903 Federal Street up to the first of May, 1912, and the plaintiff brings this suit to recover for use and occupation of that room for the two years from May 1, 1910, to May 1, 1912, and the jury rendered a verdict in favor of the plaintiffs.

The defendant suggests two reasons why judgment should be entered for the defendant *non obstante veredicto*. The first is that the relation of landlord and tenant did not exist and, therefore, assumpsit cannot be maintained for use and occupation. This case was in the Supreme Court, and that Court's decision of the case is reported in 63 Supr. Ct. 607, in which it was held that the facts as presented to that Court were sufficient to support an action and create a liability on the part of the defendant. In this case the evidence of the relationship of landlord and tenant is stronger than in the case that was presented to the Superior Court. The defendant was a tenant of these two plaintiffs, *inter alia*, from May 1, 1907, to May 1, 1910, by virtue of the lease dated February 8, 1907, for one year and the holding over by him for the two years following; and his continued occupancy of the room after May 1, 1910, continued the relationship of landlord and tenant as between himself and these two plaintiffs.

It is urged by counsel for the defendant that the defendant knew nothing of the proceedings in partition and, therefore, knew nothing of the change of ownership in the premises. But the proceedings in partition and the record thereof was a public record of which he had constructive notice, and besides he knew that on February 8, 1907, he had leased these premises from five heirs of Henry Sutmeyer, all of whom signed the lease which he got at that time, and that on May 1, 1910, he leased the premises from Mrs. Young and Mrs White without the other heirs of Henry Sutmeyer joining in the lease, and he had notice there of a change of ownership in the premises. If he could have leased these premises for five years and avoid payment of rent because he had not been given actual notice of the change of title resulting from the partition proceedings of the Sutmeyer heirs, he could have leased them for fifty years from two of those heirs.

Defendant's counsel makes a point that the plaintiffs are estopped because they did not notify the defendant immediately and waited two years before they notified him that he was occupying their premises without paying rent. I do not know any reason why the owner of real estate should be estopped from claiming compensation for use and occupancy because he has not notified the one who is occupying it to pay his rent. The reason given for not notifying defendant, viz., that plaintiffs thought the lease of February 8, 1907, was for five years, may have been the reason why plaintiffs did not notify defendant sooner. I see no reason to disturb the verdict rendered in favor of the plaintiff by the jury in this case.

Perago v. York Railways Co.

Certiorari—Issnance Before Hearing.

The hearing of the suit before an alderman was continued from July 19 to July 25. On July 21 a certiorari was issued and served on the alderman July 24. HELD, that proceedings under the certiorari must be dismissed.

It is impossible for the court to determine what the judgment of the alderman would have been if he had been allowed to proceed.

No. 139 August Term, 1917.

Certiorari.

Jno. A. Hoober and *Geo. S. Schmidt* for certiorari.

October 1, 1917. Ross, J.—At the instance of the above named defendant, a certiorari was issued out of the Prothonotary's office July 21st, 1917, directed to Joseph S. Harmon, Esq., an alderman for the Seventh Ward of the City of York.

In response to the certiorari the alderman returned a transcript of his records in the above named suit, showing that the parties to the suit had not yet been heard when the certiorari was served.

The summons issued was made returnable July 19th, 1917. On July 19th, 1917, the alderman not being in his office at the time set for the hearing, the case was continued to July 25th, 1917, at one o'clock P. M.

The return of the Sheriff shows that the certiorari was served upon the alderman July 24th, 1917.

We have no other legal information regarding the facts or formality of the proceedings before the alderman than that contained in the transcript. From that we can only determine that the case before the alderman was interrupted by an improvidently issued certiorari. It is impossible for this Court to determine from the record what the final judgment of the alderman would have been if he had been allowed to pronounce judgment after the time fixed for the hearing of the case, "July 25, 1917, at 1 o'clock P. M." The defendant's exceptions, therefore, cannot now be determined and the proceedings must be dismissed.

The proceedings under the certiorari are dismissed at the costs of defendant.

C. P. of Delaware Co.

Lansdowne Borough vs. Burdsall.

Boroughs—Sidewalks—Curbing and Paving—Notice to Pave—Grading—New Trial.

A notice to curb and pave sidewalks of a borough, served before the sidewalk is brought from the natural to the established grade, is not sufficient to sustain a lien for curbing and paving after the borough does the grading. To charge the property owner it is necessary to serve a notice after the borough brings the sidewalk to grade.

The credibility of oral testimony is for the jury, but where the verdict shows that the jury found against uncontradicted evidence for which there was no reason to warrant its disbelief, a new trial will be granted.

Motion for a new trial.

Robinson, Marsh & Kauffman and *Chas. L. Smyth,* for motion.

Oswald M. Millig and *John F. Gorman,* contra.

June 1, 1917. BROOMALL, J.—On May 12, 1911, the plaintiff filed a municipal lien in this court against the defendant's land, for constructing curbs and gutters on South Union Avenue in front of his land, in pursuance of ordinances of the Borough, for the sum of two hundred and nineteen dollars and eighty-two cents and a penalty of twenty per cent., making an aggregate sum of two hundred and sixty-three dollars and seventy-eight cents. The lien avers that the work was completed on November 23, 1910; that a notice by the plaintiff to the defendant to do this work was served on him sixty days in advance of the doing of the work, on June 21, 1910, and that a notice of intention to file a lien was served upon him at least one month before filing thereof.

A *scire facias* was issued on this lien on December 7, 1911.

On January 5, 1912, defendant filed an affidavit of defense, averring that on September 14, 1910, he was notified by the plaintiff to construct curb and gutters in front of his said land, within twenty days; that this was the only notice received by him; that at that time his land and the street were at the natural grade; that the plaintiff on September 2, 1910, authorized its highway committee to change the said grade; and the change of grade opposite his land was made by work which commenced on October 15, 1910, and was complete on or about November 15, 1910. That this change of grade

amounted to a lowering of the grade of between two and three feet seven inches.

The case went to trial on the averments of the lien and affidavit of defense. We presume this was under the fifteenth section of the Act of June 4, 1901, P. L. 364. However this may be, this was the issue upon which the parties went to trial.

The lien avers in accordance with the requirements of the eleventh section of the Act of June 4, 1901:

1. The name of the borough by which the lien was filed.

2. The name of the owner of the property.

3. A description of the property.

4. The authority under which the work was done, being certain borough ordinances.

5. The date when the work was completed, November 23, 1910.

6. The date of the contract of the use plaintiff with the borough.

7. The kind and character of the work, and a notice by the highway commissioner served on the owner on June 21, 1910, sixty days in advance of the work.

The affidavit of defence takes issue with the fourth and seventh averments in the foregoing category. It challenges the authority of the borough to do the work at his expense, because at the time the work was ordered on September 14, 1910, the ground was two or three feet above grade, and that the borough was under the legal obligation to put the ground to grade before he could be asked to do the work. This contention rests upon the following authorities: Steelton Borough v. Booser, 162 Pa. 630; Philadelphia v. Weaver, 14 Pa. Ct. 293; Chester City v. Lane, 24 Pa. Supr. Ct. 359; Correll v. Mt. Jewett Borough, 49 Pa. Supr. Ct. 118. And evidence and law respecting this contention was that the borough ordinance of May 1, 1907, required the property owner to do the work within twenty days. On the neglect or refusal of the property owner to do the work, the Act of April 20, 1905, P. L. 235, since repealed by the Act of May 14, 1915, P. L. 439, authorized the Borough to do the work, and collect the cost with ten per centum penalty. We erroneously charged the jury to limit the penalty to five per centum, our attention not being called to the Act of 1905 but of this the defendant cannot complain, and the plaintiff does not. The further evidence was that a notice to do the work within twenty days was served on the defendant on September 14, 1910. That at that time the ground was some three feet ten inches above where the curbstone and gutter were to be set. That the borough commenced to grade on October 8, 1910, and finished it in about a month, and that without further notice to the defendant, the work was done, setting the curbstone and gutter some three feet ten inches below the previous level of the ground, completing the work on November 23, 1910. There was no variance between the parties, that the notice referred to in the lien, which is alleged to have been served on June 21, 1910, was not served, but that notice was served on September 14, 1910. In our judgment this answered all the legal requirements as to notice. The jury were charged that if they believed the evidence of the defendant that when he was notified to do the work, it required an excavation of three feet ten inches in order to set the curbstone and gutter at grade, and that subsequently the borough did this grading, and without further notice to him, the borough did the curbing and guttering, the verdict should be for the defendant. The jury rendered a verdict for the plaintiff. To reach this conclusion, they must have disbelieved the defendant. While they had the legal right to do this, we know of no reason which appeared in the trial of the cause to warrant such disbelief. Hence we think there should be a new trial, and therefore award it, and refuse defendant's motion for judgment n. o. v.

Public Schools—Township Having No High School—Tuition—Liability For—Where a township permitted one of its scholars to attend a certain high school for the first year, paying the tuition therefor, but ordered that this scholar attend another high school the next year, but the parent of the scholar, instead of doing this, paid the tuition to the high school which his child had attended the year before, he can recover the amount thus paid from the school board of the township, when notice of the change in high schools was not given the parent before the beginning of the second school year.—*McKinney* v. *School District*—(Allegheny C.P.) 65 Pittsburg Legal Journal 27.

March v. March.

Divorce — Alimony — Counsel Fee — Payment.

To a libel in divorce charging the wife with desertion and adultery, the respondent replied charging her husband with adultery, and demanding trial by jury. Subsequently she asked for alimony *pendante lite* and counsel fee. HELD, that an allowance will be made for counsel fee.

Under the circumstance appearing from the record, alimony at this time would be improper.

After an interval of several months, the husband not having paid the counsel fee, an attachment for contempt was asked. HELD, as no time for payment was fixed in the orignal order, the attachment must be denied; but a new order, requiring payment within thirty days, was made.

No. 138, August Term, 1916.

Rule to show cause why counsel fee and alimony should not be awarded to respondent.

Rule for attachment.

W. B. Gemmill and *R. P. Sherwood* for rules.

Logan & Logan, contra.

December 26th, 1916. Ross, J.—The libellant in this case seeks a divorce from his wife, Clara J. March, because, as he alleges, she has deserted him and because she has committed adultery with a person who is named in the libel.

The respondent filed her answer, denying the allegations charging her with adultery, and averring that the reason for her leaving her husband was because he has committed adultery with various females named in the answer, at the time specified in the answer. She further avers that she was compelled to leave her husband because he was afflicted with a venereal disease which he contracted by adulterous practice and because of his cruel and barbarous treatment of her. She resists the application for divorce and asks for a trial of the facts by a jury.

The respondent now asks for alimouy and counsel fee to enable her to refute the charges made by the libellant. There was no testimony presented to the court which would enable us to determine the financial condition of respondent. Indeed, no testimony of any kind was presented to the court; but from the admissions of the attorneys made during the argument of the rule and answer we are inclined to grant the respondent the sum of forty dollars as counsel fee. An award of alimony would be improper under the circumstances as they now appear.

It is ordered that the rule be made absolute and the libellant is hereby ordered to pay the respondent the sum of forty dollars for the purpose of paying her counsel for the preparation and conduct of her defense to the libel.

The libellant failing to make such payment, a rule to show cause why an attachment should not issue for contempt of Court was granted. On this rule the following opinion was filed.

October 1st, 1917. Ross, J.—The Court granted a rule on the plaintiff to show cause why he should not pay alimony and counsel fees in the above named case to Clara J. March. On December 26th, 1916, an opinion was filed and the following order entered:

"And now, December 26th, 1916; It is ordered that the rule be made absolute and the libellant is hereby ordered to pay the respondent the sum of forty dollars for the purpose of paying her counsel for the preparation and conduct of her defense in the libel."

It appears that the libellant has not complied with that order. As no definite time was set in the order for the payment of said fee, it would not be proper for the Court at this time to grant the prayer of the respondent's petition and adjudge the libellant in contempt of Court; but the following qualification to the order heretofore made is now entered.

The libellant, John H. March, is ordered to pay the sum of forty dollars to the respondent for counsel fee in the preparation and conduct of her defence to the charges contained in the libel for divorce filed in the above case, within thirty days from this date, or be adjudged in contempt of Court.

The rule granted in this case is hereby discharged at the cost of the libellant.

C. P. of Lackawanna Co.

Pfahler v. Borough of Dunmore.

Borough—Ordinance Delegating Power—Removal of Policeman—Act May 14, 1915, P. L. 312.

A borough council has exclusive authority under the Borough Act of May 14, 1915, P. L. 312, to summarily remove a policeman from office for proper cause, and may, by ordinance, delegate to the chief of police the right to exercise that authority subject to the supervisory control of the council.

That authority is not abridged by the clause in the Act of 1915 giving the burgess certain control of the police with the power to suspend a policeman pending the action of the council.

Rule for new trial.

F. E. Boyle for plaintiff.

J. W. McDonald for defendant.

April 23, 1917. EDWARDS, P. J.—Plaintiff was a policeman of the Borough of Dunmore and has brought suit for his wages, covering a period of nearly two months, from January 24 to March 21, 1916. The jury was instructed to find a verdict for the defendant.

The ordinance in force in the borough in 1916 provides, inter alia, that the chief of police shall have power and authority to summarily dismiss or remove from office any officer for various enumerated causes, among which is that of intoxication. Any officer so removed shall have the right to have his case passed upon by the borough council if, within ten days, he make requst in writing to the council for a hearing, such request to be served upon the president of the council. There can be no dispute as to the facts disclosed by the evidence. The chief police dismissed the officer for intoxication, on January 24, 1916. The officer does not deny the charge; but he failed to make request in writing to the council for a hearing as provided in the ordinance. For this reason the plaintiff failed to make out a case.

There seems to have been an informal meeting of the councilmen on March 21, 1916, at which time plaintiff was informed that he was discharged; in other words, that the action of the chief of police was sustained. We say that this meeting of the councilmen was informal because it was not a regular nor a special meeting; and there is no record or minute of such a meeting. The theory of the plaintiff is that he is entitled to wages up to March 21, because he was not finally discharged, as he claims, until that time; but the action of the councilmen on that date was clearly without validity in law, and was not effective for any purpose.

The real question in the case is: was the action of the chief of police proper under the present borough law? Plaintiff claims that the chief of police had no authority to dismiss nor suspend a policeman. One of the provisions of the Borough Act of 1915 relating to police is as follows: "The borough police shall be under the direction of the burgess, as to the time during which, the place where, and the manner in which, they shall perform their duties. The burgess may, for cause and without pay, suspend any policeman until the succeeding regular meeting of council, at which time the council may discharge or reinstate such policeman." The same act of assembly also provides that "borough councils may appoint and remove" policemen. It is clear that the power to remove policemen is vested exclusively in the council. As to the partiular method by which this power may be exercised, whether by direct and initiatory action on the part of the council, or by an ordinance directing the chief of police to act subject to the supervisory control of the council—this is a question to be determined by the council itself, as it has done in this instance by the enactment of the ordinance referred to. I am of the opinion that the ordinance is valid, and that the borough council of Dunmore still has the right to appoint a chief of police and to define his powers, notwithstanding the fact that under the new borough law the burgess has certain supervisory control over the police and has the power to "suspend" a policeman. It is not for the courts to question the right of the legislature to enact legislation not prohibited by the constitution, although it seems an anomaly in municipal legislation to confer upon the burgess of a borough, regardless of his qualifications, a part of the duties usually performed by a chief of police. In the case at bar, the plaintiff was lawfully removed, and for a good reason.

The rule for a new trial is discharged and a new trial is refused.

C. P. of Berks Co.

Sanitary Casket Protector Co. v. Fisher.

Principal and Agent—Authority of Agent—Representations in Sale of Stock—Admissions.

Where the representations made by an officer of a corporation to obtain a stock subscription are such as he may reasonably be presumed to have authority to make, they are admissible to show the fraud by which the subscription was procured.

In an action by a corporation on a note taken for a stock subscription, the defendant testified that the president of the corporation gave him information showing that certain representations made by the secretary of the company in order to sell the stock were false. HELD, admissible as an admission by the company.

Rules for new trial and for judgment *n. o. v.*

Joseph R. Dickinson for rule.

John B. Stevens, contra.

May 14, 1917. WAGNER, J.—Plaintiff brought suit against defendant upon a promissory note dated February 4, 1911, for $250 which defendant had executed and given to plaintiff. The defense to the note was that it had been given to plaintiff in payment of the sale by plaintiff company through its secretary, E. W. Billman, of 25 shares of the capital stock of plaintiff company, and that plaintiff was induced to purchase the shares through certain misrepresentations in writings made by E. W. Billman at the time of the sale.

The misrepresentations relied upon were those contained in a letter of January 21, 1911, to the defendant, signed E. W. Billman, Secretary, wherein as an inducement for defendant to purchase, he represented, inter alia, that the plaintiff company was operating two plants at that time, one at Reading and the other here (meaning Hamburg, Pa.). This letter was offered in evidence and objected to unless it be shown that E. W. Billman had authority from the corporation to make false representations binding the company.

There was no question but that E. W. Billman, as secretary, was authorized to sell for the company these 25 shares. Having this power of sale he certainly had the implied power to give information concerning the company whose shares he was offering for sale. In Custer v. The Titusville Gas and Water Co., 63 Pa. 381, it is held: "Where the representations are such as the agent may reasonably be presumed to have authority to make, they may be given in evidence to show the fraud by which the subscription was procured." See also Acetylene Co. v. Smith, 10 Pa. Sup. Ct. 61, 64; Phila. Motor Speedway Asso. v. Sale, 25 Dist. Rep. 1101, 1103.

The representation that the company was operating two plants, one at Reading and the other at Hamburg, related to the status of the company, and was material. We do not consider that there was any error in the admission of the evidence.

The next question then was whether these representations were false. The defendant stated in direct examination that at the time the alleged false representations were made the plaintiff company was not operating two plants as stated in the letter. Upon cross-examination by plaintiff's counsel as to the source of this information, he answered that Mr. Heinly, the president of the company, told him that they did not have two plants.

The fifth reason of a new trial complains of the admission of this evidence upon the ground that it is mere hearsay. This information having been elicited by plaintiff's counsel upon cross-examination, could hardly be assigned by plaintiff as a reason for a new trial. Neither is this hearsay evidence, but an admission by the company through its president. The question as to whether or not the company was operating two plants at the time the letter was written, after plaintiff's witnesses had testified in rebuttal, was hardly any longer a disputed one. Mr. Heinly, the president of the company, when asked whether they had two plants in operation and where they were, answered that they had two plants, one at Reading and one at Hamburg, and that they "had them in operation. The Hamburg plant was just being equipped at that time." This answer clearly shows that the Hamburg plant was not then in operation. When asked by the court with reference to the Hamburg plant, we have (N. of T., p. 13):

"Q. The question was whether it was in operation? A. In the spring.

Q. The question is: Was it in operation at that time—were you operating it at that time, January, 1911? A. Not in January, no sir."

The former secretary, E. W. Billman, testified that the Reading plant was in operation at the time he made the representations, and the Hamburg plant was undergo-

ing improvements. There seems to be no question from the evidence of the officials of the company that when these representations were made on January 21, 1911, they were false at least as to the Hamburg plant.

Defendant testified that upon receipt of this letter he went to Hamburg, showed it to Mr. Heinly, the president, and was assured by him that the statements herein contained were true. That, relying upon the strength of this letter he gave the note upon which suit was brought in payment of the stock. When subsequently he discovered the truth as to these representations, he returned the stock to the plaintiff, who refused to accept it but sent it back to him. We do not consider that there is anything in this case to warrant the granting of a new trial. It was a case for the jury to determine.

Rules for new trial and for judgment n. o. v. are discharged.

C. P. of Schuylkill Co.

Com. ex rel. Brown v. Pfeil et al.

Acts of March 31, 1869, P. L. 382 and May 28, 1907, P. L. 262—Councilmen contracting with Fire Company of which they are members.

The act of March 31, 1860, P. L. 382, does not confine the interest of a member of town council to a money or pecuniary interest coming directly to the member of the corporation.

Members of Council who are also members of a fire company violate the Act of Assembly if they enter into a contract between the borough and such fire company and will be ousted from their office of Council.

A member of council who is secretary of the fire company comes clearly within the provisions of the Act of May 28, 1907, P. L. 262.

Quo Warranto.

J. O. Ulrich for writ.

A. L. Shay, contra.

August 29, 1907. JOHNSON, P. J.—This is a proceeding in quo warranto, in which the Court is asked to oust the defendants from their offices as Councilmen of the Borough of Tamaqua.

The question here to be determined is whether the defendants, members of the Town Council of the Borough of Tamaqua, have forfeited the rights to hold their offices for entering into contracts with the American Hose Company No. 1, of Tamaqua, of which they were at the time members, for the hauling of coal, garbage and other materials for the said Borough of Tamaqua, for which services the hose company were paid various sums of money.

Facts sufficient to decide this case are set forth and admitted in the pleadings. The American Hose Company No. 1 of Tamaqua is a corporation of the first class, organized for the purpose of rendering assistance to citizens in the extinguishment of fires, and pays death benefits to the families of deceased members, out of a fund supplied by the payment of dues. The hose company was employed by the Borough during the years 1914 and 1915 in the hauling of coal, garbage and other material, for the Borough, for which large sums of money were paid. On March 7, 1916, the Borough, through its Council, entered into a contract with the hose company by which the hose company agreed to collect and remove garbage, refuse, etc., during a period of five years, for the sum of $14,000.00, to be paid in monthly installments. In the making of these contracts between the Borough and the hose company, it is contended that the defendants violated Section 66 of the Criminal Code of 1860, and the Act of May 28, 1907, P. L. 262.

Section 66, of the Act of March 31, 1860, P. L. 382, provides as follows:

"It shall not be lawful for any councilman, burgess, trustee, manager or director of any corporation, municipality or public institution, to be at the same time a treasurer, secretary or other officer, subordinate to the president and directors, who shall receive a salary therefrom, or be the surety of such officer, nor shall any member of any corporation or public institution, or any officer or agent thereof, be in anywise interested in any contract for the sale or furnishing of any supplies, or materials to be furnished to, or for the use of any corporation, municipality or public institution of which he shall be a member or officer, or for which he shall be an agent, nor directly nor indirectly interested therein, nor receive any reward or gratuity from any person interested in such contract or sale; and any person violating these provisions, or either of them, shall forfeit his membership in such corporation, municipality or institution, and his office or appointment thereunder," etc.

The Act of May 28, 1907, P. L. 262, provides:

"That it shall not be lawful for any burgess or member of council of any borough, or any officer, agent or employe thereof, to be in any way interested either directly or indirectly, in any contract for the sale or furnishing of any supplies or materials to be furnished to or for the use of such borough, or to receive any reward or gratuity from any person interested in such contract or sale; nor shall any such burgess, member of council, officer, agent or employe of any borough be a member of any partnership or a stockholder or officer of any corporation, or an agent or employe of any individual, partnership, or corporation, in any way interested in any contract for the sale or furnishing of any supplies or materials to be furnished to or for the use of, or any work to be done for, such borough; and any person violating these provisions, or any of them, shall forfeit his office or appointment in such borough," etc.

Section 66, of the Act of March 31, 1860, is broad in its terms, and provides:

"Nor shall any member of any corporation or public institution, or any officer or agent thereof, be in any wise interested in any contract for the sale or furnishing of any supplies or materials to be furnished to or for the use of any corporation, municipality or public institution, of which he shall be an agent, nor directly nor indirectly interested therein, nor receive any reward or gratuity from any person interested in such contract or sale."

This section does not confine the interest to a money or pecuniary interest coming directly to the member of the corporation or institution. These defendants, members of the American Hose Company, were interested in the company and in the contracts made with the company, and for their company to enter into contracts as here complained of, with the Town Council of Tamaqua, of which they were members, is against public policy and in violation of both the letter and the spirit of Section 66 of the Act of March 31, 1860.

These defendants could not serve two masters. They could not, under the law, contract with themselves.

No doubt the defendants did not intend to violate any law, but, as said in Com. ex rel. Whitehouse v. Harris, 248 Pa. 573, "It is a public officer's duty to acquaint himself with the statutory laws respecting his office. It behooves him to do so, if he be willing to do his whole duty, and a plea of ignorance in such a case would show neglect and want of diligence on the part of the officer."

The Deputy Attorney General, William M. Hargest, in this case, speaking of the Acts of Assembly referred to, has well said:

"They were enacted in the interest of the public, not only to prevent graft and the awarding of contracts or private gain to councilmen, but also to prevent contracts being given to favored persons or corporations at perhaps higher prices than the same service or materials could be obtained elsewhere.

"To prevent pecuniary benefit to any public official was not the only mischief sought to be remedied. The evil was broader, and the remedy intended to be more comprehensive, than the mere financial interests of the councilmen. If councilmen are prevented from being directly or indirectly interested in any contract for the sale or furnishing of supplies by a corporation of the second class organized for profit, but may, in behalf of the borough, contract ad libitum with corporations of the first class in which they are members, the remedy sought to be applied by these Acts of Assembly is not complete."

We are quite sure that to permit members of a fire company such as this to enter into contracts with a Borough Council of which they are members, is to open the road to recklessness, extravagance and temptation, the very things which the Acts of Assembly cited were intended to prevent.

Louis Pfeil, one of the defendants, was the secretary of the American Hose Company, and therefore, comes clearly within the provisions of the Act of May 28, 1907, P. L. 262.

The demurrer to the defendants' answer was overruled without writing an opinion, on the understanding with counsel of both sides that it was merely for the purpose of hearing some evidence before the court alone without a jury. Evidently counsel for defendants misunderstood the court, for without any hearing of evidence before the court the defendants asked for a jury trial. But as sufficient facts are set forth and admitted in the pleadings, the decree meant temporarily to overrule the demurrer should now be vacated. The demurrer should be sustained, and the defendants should be ousted from their offices as Councilmen of the Borough of Tamaqua.

The decree overruling the demurrer is vacated, the demurrer to the plaintiff's petition is sustained, the motion for judgment in favor of the defendants is overruled, the petition for a jury trial is refused, and judgment is directed to be entered against the defendants, Louis Pfeil, William R. Conrad, William Wiegand and Frederick Ruppert, ousting them from their offices as Councilmen of the Borough of Tamaqua.

C. P. of Lackawanna Co.

Robertson v. International Textbook Co.

Statement—Sufficiency—Practice Act 1915.

Under the Practice Act of 1915, a statement should disclose, for the information of the defendant, the essential facts of plaintiff's case with a copy of all accounts where that is made necessary by the character of plaintiff's claim.

Where the claim is for salary and commissions and money expended, in accordance with a contract between the parties, the defendant is entitled to a statement showing for what period a given weekly salary is claimed; on what items or moneys the commissions are based, and where and how earned; and in the matter of moneys expended it should state when and to whom the moneys were paid.

Affidavit of defense raising questions of law only.

C. H. Soper for plaintiff.

H. R. Van Deusen for defendant.

May 7th, 1917. EDWARDS, P. J.—The original statement in this case contained a complete copy of the contract between the parties, and alleged a breach and repudiation of the contract by the defendant on April 6, 1910. The suit was begun on October 6, 1916. Defendant thereupon, by affidavit, raised the question of the statute of limitations. An order was then made allowing the plaintiff to file an amended statement, which is the statement now before us with an affidavit of defense raising questions of law.

According to the terms of the contract, the plaintiff was appointed general agent for the defendant for the following territory: "All of Africa, excepting Morocco, Algeria, Tunis, Tripoli and Egypt." The nature of his duties is fully described in the contract, and his compensation, with some other minor allowances, is fixed at "one pound per month and a commission of fifty (50%) per cent. of the total amount of money received," etc. It is provided in the contract that "The said general agent shall deduct and retain the said salary, commission, and compensation from the total amount of money received during the continuance of this agreement by him and his sub-agents on all contracts made as aforesaid with the parties in said territory, and the remainder of the amount so received he shall transmit or pay each mail to the said principal or its duly authorized representative, and shall each mail transmit or deliver to said principal, or its duly authorized representative, all contracts received by him and his sub-agents for said principal, together with detailed statement of all moneys received by him and his sub-agents, and a detailed statement of all reference libraries and outfits delivered or forwarded to parties making contracts as aforesaid in said territory; also a detailed statement of all reference libraries returned by or recovered from parties in said territory."

There is no allegation in the amended statement touching the breach or repudiation of the contract by the defendant. So far as the parties are concerned, and looking only at the amended statement and its averments, the contract is still in force, and the plaintiff is still the general agent of the defendant for the territory named. This is apparent from the third paragraph of the statement which reads thus:

"That notwithstanding the defendant's covenants to pay to me the sum of one pound per month and fifty per cent. of all moneys received during the continuance of said agreement, yet the said defendant has utterly failed to pay and still refuses to pay me as provided in said contract, for the whole period of time since the first day of November, 1907, to the bringing of this suit."

We are impressed with the fact that the basis of recovery as alleged in the amended statement differs from that set forth in the original statement. In the latter, the plaintiff averred a repudiation of the contract, the breach occurring in April, 1910; according to the former, the contract is still in force, and the plaintiff seeks to recover the moneys due to him from the date of the contract to the date of the institution of the suit, thus avoiding, on the face of the statement, any question as to the statute of limitations. However, we have no present concern with this phase of the case. As a matter of pleading, we have nothing before us except the amended statement and the objection thereto.

The weakness of the amended statement is in the fourth paragraph, which is as follows:

"That there is due me from said defendant by way of salary and commissions as provided in said contract the sum of four hundred and fifty thousand dollars and money expended in behalf of said defendant relying upon the agreement aforesaid the further sum of fifty thousand dollars, in all to wit the sum of five hundred thousand dollars."

Defendant is entitled to a full statement of the items, with dates and amounts, which go to make up this sum of half a million dollars. For what period of time is the salary of one pound a week claimed? On what items, or on what moneys, are the commissions based? When and how were the commissions earned? How were the fifty thousand dollars expended? When, and to whom, were the moneys paid?

The statement should contain all the material allegations constituting the basis of plaintiff's claim. As there is no provision for a bill of particulars in the Practice Act of 1915, it follows that the statement should disclose, for the information of the defendant, the essential facts of plaintiff's case, with a copy of all accounts where that is made necessary by the character of plaintiff's claim.

As the law is liberal in the matter of amendments to pleadings, we allow plaintiff thirty days from this date in which to file a second amended statement; otherwise judgment for defendant.

C. P. of Delaware Co

Hoffman v. Marker.

Judgment—Satisfaction—Act of 14 March, 1876, P. L. 7—Settlement for Less Than Claim.

The Act of 14 March, 1876, authorizing the court to direct the prothonotary to mark judgments satisfied, applies only to a clear case of a paid judgment. If there is any dispute as to the fact of payment the defendant must move to have the judgment opened and the disputed facts decided by a jury.

A plaintiff who accepts in full settlement of a judgment cash and a note aggregating less than his claim, is estopped from afterward claiming the balance.

Petition and rule for entry of satisfaction of judgment.

J. DeHaven Ledward and *Jos. H. Hinkson* for rule.

E. A. Howell, contra.

October 20, 1916. BROOMALL, J.—This judgment was entered on a judgment note, with warrant of attorney, dated September 1, 1915, payable in one day, for six hundred and fifty dollars.

The Act of 1876 refers only to a clear case of a paid judgment. If there is any dispute between the parties as to the fact of payment, the act has no application, but in that case the defendant must resort to the remedy of an application to have the judgment opened and a trial by jury to resolve the disputed facts.

The testimony offered by the defendant tends to show that being indebted to the plaintiff in the sum of seven hundred dollars, for which the plaintiff had judgments of record, and the defendant being about to obtain a loan on mortgage out of which the plaintiff and others were to be paid and plaintiff's judgments satisfied of record, the plaintiff and defendant agreed that the plaintiff would accept four hundred dollars in cash and a note for two hundred dollars in full payment of the seven hundred dollar debt. The judgment in this case of six hundred and fifty dollars was given by the defendant to the plaintiff to secure the above two hundred dollar note, as well as another note for four hundred and fifty dollars given by the defendant to the plaintiff, and it appears that these two notes have been fully paid.

An answer was filed by the plaintiff denying that the judgment was given for the two notes alone, and alleging that the judgment was given on account of a debt of seven hundred and fifty dollars made up by charging the defendant with his debt of seven hundred dollars and crediting him with four hundred dollars cash paid and charging him with the four hundred and fifty dollar note. At the hearing upon this rule, the plaintiff testified, and therefore this answer must be interpreted by his testimony. He testified that a short time before the note under consideration was given, the defendant proposed to him to pay six hundred dollars cash in full settlement of his seven hundred dollar debt, which he agreed to accept. Afterwards when they met to settle, and when the plaintiff learned that he was not to get six hundred dollars in cash, but instead thereof he was to get four hundred dollars in cash and promissory note for two hundred dollars, he said to the defendant, that that was not the understanding, and that the defendant said, "well. it is all right." The

plaintiff said to defendant "this does not cover full," and the defendant said, "you agreed upon taking six hundred dollars for the seven hundred dollars.,' The plaintiff then accepted the cash four hundred dollars and a note for two hundred dollars. At this stage, the plaintiff's testimony must be considered as verity, but taking it as literally true, the inference is irresistible that the plaintiff accepted the four hundred dollars cash and two hundred dollar note in full settlement of the seven hundred dollar claim, and a jury would not be permitted to draw any other inference. When the plaintiff knew that the defendant was paying four hundred dollars cash and a note for two hundred dollars as a substitute for six hundred dollars cash under the agreement, he could not entertain an undisclosed purpose to retain a claim for the remaining one hundred dollars on the ground that he was not getting the six hundred dollars in cash. The defendant was making the payment in full, and the plaintiff knew he was making payment in full, and the plaintiff accepted the payment and satisfied the judgments, which he held as security for his seven hundred dollar claim, and accepted a new judgment for the two hundred dollars plus his endorsement of defendant's note for four hundred and fifty dollars.

We are, therefore, satisfied that said judgment has been fully paid, and we direct the prothonotary to mark it satisfied on record, and that the plaintiff pay all costs incurred in the premises.

C. P. of Lackawanna Co.

Johnson Co. v. Pryor et al.

Replevin—Leased property—Bailment.

An agreement to lease and demise a certain oven for a term of eight months, with covenant for surrender of the property at the end of the term. coupled with an option to buy at that time for a stated sum if the rent sheould then have been paid, the amount received as rent in that case to be applied as purchase money, is a contract, of bailment, and cannot be made to operate as a sale at the time of its date, in the absence of anything to either impeach or vary its terms.

Where the property so leased was taken in execution and sold by the sheriff within the eight months' term on a judgment against the lessee at the suit of a creditor, the sheriff's vendee acquired no title.

Motion for judgment.

Beers & Grambs for Plaintiff.

Rutherford & Burns for Defendants.

June 18, 1917. NEWCOMB, J.—The action is replevin for a certain oven which has been repossessed by plaintiff as appears by the sheriff's return of service. There are several defendants, but defense is taken only by Mr. Rutherford and it is the sufficiency of his affidavit that is now in question.

The undisputed facts disclosed by the pleadings are as follows: (1), Title to the property was in plaintiff on July 11, 1916; (2), it was then delivered to the defendant Pryor upon his payment of the sum of $135, and the execution and delivery to plaintiff of the writing declared upon as a bailment lease; (3), further payments on account were made by him but eventually he made default; (4), thereafter, to wit, in February, this year, the property was taken in execution on a judgment against him at suit of a creditor and in due course of law sold by the sheriff to Mr. Rutherford, who sets up as his defense the right thereby acquired. What he claims is that Pryor took the legal title as plaintiff's vendee, and it was transferred to him by the sheriff's seizure and sale for Pryor's debt. His contention, therefore, is that both by reason of its terms and what was said by and between the parties at the time, the written instrument merely evidenced a sale, and not a leasing of the property.

The attempt to either vary or explain the writing by parol merits no consideration. It is altogether too vague and indefinite for that purpose and may be dismissed without further comment.

As to the writing itself the argument is that it cannot be a lease because it is void for uncertainty in that it specifies no amount to be paid as rent, either the amount to be paid down nor that of the monthly instalments. True, the operative words of the demise, if taken alone, might be open to that criticism. They are as follows: "* * * does hereby lease and demise unto the said party of the second part one, etc., etc., for and during the full term of eight months for which the said second party agrees to pay for the use of the same, as follows: One-half on order and balance in eight monthly instalments." Then follow the covenants usual in such cases against sub-letting, removal, etc., together with that for surrender at the end of the term, coupled with an

option to buy, if the rent should have been paid, "for the sum of $265," upon which the amount received would in that case be applied as purchase money.

One answer to the argument is that the parties themselves seem to have had no difficulty in understanding the contract. It is not Pryor who now calls it in question. He has disappeared, so that the writ could not be served upon him. But the more conclusive answer is found in the maxim: that is certain which is capable of being reduced to certainty. "This agreement made," etc., says the writing, "witnesseth that the said party of the first part for a consideration hereinafter mentioned, does hereby lease and demise unto the said party of the second part," etc.

The consideration thereinafter mentioned was the sum of $265, upon the payment of which, according to the stipulated terms, lessee could at his election take the title. No doubt such eventual sale was the thing in mind of the parties. But the contract did not purport to pass the title on any other terms, and until the event should happen upon which the option to buy depended, the payments must be deemed to be just what the parties agreed they should be, viz., payments for the use or hire of the property. On the face of the writing $132.50 would be the down payment. It is alleged, and not denied, that the amount then paid was $135. Let it be either sum, the monthly instalments would, as a matter of law, be the equal eighth parts of the balance. Hence there is no uncertainty in that regard. It is very evident that there was no agreement to sell during the term of the lease. It is, therefore, quite out of the question to make the writing operate as a sale at the time of its date; and in the absence of anything to either impeach or vary its terms it must be held to be just what it purports to be, to wit, a contract of bailment which was lawfully terminated by this proceeding for breach by the bailee of his covenant to pay for the use. The issue is, therefore, with the plaintiff and the exceptions to the affidavit of defense are sustained. There is nothing in the pleadings to support an assessment of substantial damages, and these will have to be nominal.

The rule to show cause is made absolute. Let judgment be entered for plaintiff for the goods and chattels described in the writ with costs together with one dollar damages for detention.

Niles et al. v. Richley.

Equity—Public Garage—Damage to Adjacent Properties.

Plaintiffs' bill set forth the proposed erection of a public service garage by defendant, the injuries that would result therefrom to their respective properties, and prayed for an injunction. Defendant demurred, contending that no injunction could be issued in advance of the erection of the garage; that the question of whether or not it was a nuisance must first be determined by an action at law; and asked for a jury trial. HELD, that the demurrer must be dismissed and the prayer for a jury trial denied.

The allegations that the proposed garage, if it should be erected, would necessarily become a nuisance; that it would interfere with the safe and quiet use of plaintiff properties, and of the streets and sidewalks adjacent thereto; and that it would interfere with divine services in a near-by church, (one of the plaintiffs,) if fully proven, entitle the plaintiffs to equitable relief, because of the inadequacy of an action at law as a remedy for such injuries.

No. 2, August Term, 1917.

Sitting in Equity.

Stewart & Gerber and *W. A. Miller* for demurrer.

Niles & Neff, contra.

October 15, 1917. WANNER, P. J.—The plaintiffs' bill prays for an injunction to restrain the defendant from erecting and operating a public service garage on East Market Street, York, Pa., at a point indicated in said bill, for the reason that said proposed garage would necessarily become a nuisance, and would be so prejudicial to the safe and quiet enjoyment of their respective properties, that they would have no adequate remedy at law for their respective injuries.

The defendant, in a single document, filed a demurrer and an answer to the bill, including also therein a demand for a jury trial under the provisions of the Act of June 7th, 1907, P. L. 449. He denies the jurisdiction of the Court, and contends that no injunction could issue against the proposed garage, in advance of its erection and operation, and that the question of whether or not it would be a nuisance must first be determined by an action at law before a court of equity could acquire jurisdiction.

It is contended by the plaintiffs that though a public service garage may not be a nuisance per se, that if erected at the place indicated in the bill, amongst the surroundings therein described, and operated as such

garages usually are, it would necessarily result in such a continuous flagrant violation of the plaintiffs' right to the safe and quiet enjoyment of their respective premises as constitutes a nuisance and entitles them to equitable relief because they can have no adequate remedy at law for such a continuing injury.

We are of the opinion that as to its law, this case is ruled by the recent decision of the Supreme Court in Prendergast et. al. vs. Wall et. al., 257 Pa. 547, where an injunction was granted against a proposed public service garage prior to its actual erection, and without a preliminary suit at law to determine whether or not it would constitute a nuisance. That case and the numerous authorities cited therein by Court and counsel, sustains the previously recognized rule that Courts of Equity have jurisdiction not only to abate existing nuisances per se, but to prevent otherwise lawful occupations from being so conducted as to unavoidably become continuously injurious to the occupation and enjoyment of the plaintiff's premises, and prejudicial to the safe and convenient use of the streets and sidewalks abutting thereon.

That bill, like this, was against the erection of a proposed public garage in a residential section of a city, in the immediate vicinity of a church, and of the plaintiffs' respective properties, alleged to be injured thereby, and seems to be conclusive of the jurisdiction of a Court of Equity in similar circumstances. Whether or not the facts of this case, when fully heard, will establish the plaintiffs' claim to the equitable relief sought for in this case, is not the question now before the Court. The defendant's allegations in the answer filed by him, indicate a materially different state of facts from these on which the plaintiffs' prayer for equitable relief is based and the Court's legal conclusions must finally depend upon the satisfactorily proven facts of the case.

But we are now concerned only with the question whether the allegations of the plaintiffs' bill bring this case within that class which calls for equitable relief because there is no adequate remedy at law for the injuries alleged to be threatening the plaintiffs and their respective properties.

The most material allegations of the plaintiffs' bill are that the proposed public service garage, operated as such garages usually are, will necessarily become a nuisance at this place and in these surroundings; that the damage from fire, and from gas explosions; the offensive odors, noises and other annoyances, inseparably connected with the garage business, will materially reduce the value of plaintiffs' properties and will seriously interfere with the safe and quiet use and enjoyment of the same; and also with the safe use of the streets and sidewalks adjacent thereto.

It is also alleged that divine services in the Presbyterian Church, which congregation is one of the plaintiffs, will also be interfered with. These allegations would be sufficient, if fully proven, to entitle the plaintiffs to equitable relief, because of the inadequacy of an action at law as a remedy for such injuries. They are, therefore, sufficient to give a Court of Equity jurisdiction to hear the case.

The demurrer is overruled and the defendant's request for a trial by jury is refused.

C. P. of Allegheny Co,

Vargo vs. Carnegie Steel Co.

Workmen's Compensation—Widow—Not Living with Husband—Support—Finding of Referee—Appeal.

Under the Workmen's Compensation Act, claimant, widow of decedent, who was not living with her husband at the time of his death and was not actually dependent upon him for support, but was depending entirely upon her own earnings for her support, is not entitled to compensation, and a finding by the referee to this effect will not be disturbed on appeal.

Appeal from the Award of the Workmen's Compensation Board.

Wm. E. Hague for plaintiff.

Reed, Smith, Shaw & Beal for defendant.

May 4, 1917. DAVIS, J.—The referee in this case found as a finding of fact (6) "that at the time of the death of the said Steve Vargo, his widow, the claimant, was not living with him and was not then actually dependent upon him for support, but was depending entirely upon her own earnings for her support;" and as a conclusion of law (3) "that the claimant, the widow of said Steve Vargo, was not living with her deceased husband at the time of his death and was not then actually dependent upon him for support."

The exception that controls the award is that the Board erred in sustaining the above

recited findings of the referee. The finding of the referee is necessarily a finding of fact under Section 307 of the Compensation Act of 1915, P. L. 736, which provides that "no compensation shall be payable under this section to a widow unless she was living with her deceased husband at the time of his death or was then actually dependent upon him for support." Section 409 of the Act provides:

"A referee's findings of facts shall be final, unless the Board shall allow an appeal therefrom as hereinafter provided. The Board's findings of fact shall in all cases be final.

"From the referee's decision on any question of law an appeal may be taken to the Board, and from any decision of the Board on a question of law an appeal may be taken to the courts as hereinafter provided."

The court, therefore, has jurisdiction to review on appeal from the Board only questions of law arising out of the record or out of the evidence on which the conclusions of law or fact are found by the referee and affirmed by the Compensation Board.

Where there is competent legal evidence to sustain findings of fact, the decision of the referee, affirmed by the Board, is final and conclusive. The contention of the appellant in the case at bar is that under the evidence the Board should have found affirmatively instead of negatively that she was actually dependent on her husband at the time of his death.

The court in reviewing an appeal from a finding of fact cannot consider the weight of the evidence and is not in a position to pass on the credibility of the witnesses. The court is in the same position in disposing of an appeal under the Compensation Act as it is in passing on the question whether there is any evidence that requires the submission of an issue of fact to the determination of a jury.

The question of law here is, was there any legal and competent evidence on which the said finding of fact can rest or be sustained. The evidence is very limited and meager and depends to a considerable extent on the faith and credit to be given to the testimony of the claimant. She had been living away from her husband in her native country; she lived with him only a short time in the Borough of Duquesne, Pa.; she admitted that she had trouble with her husband; that she had left him and went to Passaic, N. J.; that she was working for and practically maintaining herself; and that she had remained away from Duquesne until after her husband's death, a period of nearly two years.

These facts would require a satisfactory explanation on her part of the nature of the marital relation existing between herself and her husband. The referee in his discussion of the evidence in the case has plainly stated that he could not give faith and credit to the testimony of the claimant. There was no evidence that connected the newspaper clipping (advertising for the wife) with any personal act of either the deceased or the claimant, and it should have had no evidential value in the determination of the question at issue. It does not appear that this newspaper clipping, Exhibit No. 1, controlled the finding of the referee or the Compensation Board.

We are of the opinion that there was legal evidence with inferences from the facts and circumstances in evidence that would be sufficient to leave the determination of the fact of dependency in the possession of the referee and the Compensation Board and that would require us to hold that their decision is final and conclusve.

Abstracts of Recent Decisions.

(*Cases not otherwise designated are Supreme Court Cases.*)

Water Company—Action for Rents Due—Damages for Refusal to Supply Water.—In a suit by a water company to recover arrearages of water rents for several properties, the defendant is entitled to set-off damages which he has suffered by a breach of contract to furnish him water. Where a water company enters into a separate but identical contract for each of a number of properties owned by one person, the contracts containing a provision that the water might be shut off in case of non-payment and before turning it on again the company should have the right to demand and require payment of all water rents and other charges therein agreed to, the company has no right to either shut the water off or to refuse to turn it on at one house, because of arrears due for another one.—*Springfield Consolidated Water Co. v. Griffith,* (Delaware C. P.) 14 Delaware County Reports 383.

York Legal Record

Vol. XXXI JANUARY, 1918 No. 7

COMMON PLEAS

C. P. of Lancaster Co.

Farmers' National Bank of Lititz v. Hertzler.

Promissory Note—Principal and Surety—Set Off.

On distribution of the proceeds of an attachment the amount of a protested note held by a bank on which the defendant in the attachment is endorser can not be set off against and deducted from the dividend allowable on a claim of the maker, who is insolvent, against the defendant, and awarded to the bank in full payment of the note. A regular dividend should be allowed on the note and credited on the full claim of the maker against the defendant.

Exceptions to report of Auditor.

B. F. Davis for exceptions.

Coyle & Keller, contra.

March 24, 1917. LANDIS, P. J.—On July 21, 1915, a domestic attachment was issued, at the instance of the plaintiff, against Clayton B. Hertzler, for the benefit of the said plaintiff and all the other creditors of the said defendant, and on August 21, 1915, Harvey B. Lutz, Samuel M. Ruth and Frank E. Schnerer were appointed trustees. Having converted the assets into money, these trustees filed an account, whereby a balance was shown to be in their hands for distribution of $3,759.24. An auditor was thereupon appointed by this court to make distribution of this balance, and, at the audit, Jacob B. Hertzler presented a claim against his son, Clayton B. Hertzler, for $607.06. No objection was made by any one to this claim. At the same time, the Farmers' National Bank of Lititz presented a note for $260.00, dated June 2, 1915, signed by Jacob B. Hertzler as maker, and made payable to the order of Clayton B. Hertzler. This note was endorsed by Clayton B. Hertzler and was duly protested for nonpayment. The only other fact elicited in regard to the note was that Jacob B. Hertzler at that time was a man of little or no financial responsibility.

In the distribution made by the auditor, he awarded on the claim of Jacob B. Hertzler a dividend of $317.97; but, instead of awarding it to the party who presented it, he directed that $284.08 should be paid to the Farmers' National Bank of Lititz, in order to pay the above mentioned note, upon which Jacob B. Hertzler was maker and Clayton B. Hertzler endorser, and he awarded no separate dividend on the note itself. Exceptions were, therefore, filed to this distribution, on the ground that Jacob B. Hertzler was entitled to the whole of the dividend, and the correctness of the auditor's conclusion is the question now before the court.

It is urged by the learned auditor, quoting from Craighead v. Swartz, 219 Pa. 149, that it is a settled rule of law that "when a principal has become insolvent, the surety may retain the moneys of the principal or the amount of his indebtedness to the principal as a fund for his indemnity," and that, "as between principal and surety, Courts of Equity always lend their aid for the protection of the latter" (Beaver v. Beaver, 23 Pa. 167). He seemed to think that, in pursuance of this doctrine, the Farmers' National Bank of Lititz was entitled to receive payment of its note before Jacob B. Hertzler could be allowed anything upon his independent claim. We think that he erred in this conclusion and that these authorities have been misunderstood.

If Jacob B. Hertzler had brought suit against Clayton B. Hertzler to recover the sum of $607.06, it must be conceded that, upon Clayton B. Hertzler's paying to the bank the note of $260.00 upon which he was surety, he could have set off the amount thus paid by him against the claim for which the suit was brought, and, in that event, Jacob B. Hertzler could only have recovered judgment for the balance due him over and above the amount of the note and interest. It also follows that, in a case of insolvency, like this, when the note is presented in the distribution of the assets, and a dividend is awarded upon it out of the insolvent surety's estate, the amount thus awarded for the benefit of the claimant ought to be set off against any other claim presented by the maker of the note against the surety's insolvent estate. By these means the rights of the principal and the surety are equitably regulated, and that is the only purpose of the rule. It is applied strictly between principal and surety, and does not apply in favor of third parties, so as to give them an advantage which otherwise would not accrue to them.

It must be remembered that, in this case, the Farmers' National Bank of Lititz had no connection whatever with the claim of Jacob B. Hertzler against Clayton B. Hertzler, and its note was in no wise connected with that transaction. We know, therefore, of no authority which enables the auditor to take the dividend upon that claim and summarily apply it to the payment of any note which a third party happens to have against the maker, and the surety. What right has the bank to the whole dividend over and above other creditors, even if a power existed to withhold the dividend for the benefit of the surety's estate? The cases cited by the learned auditor arise out of equity between the parties to the identical transaction, and they are cases where, by judgment or mortgage, the definite rights of the parties are fixed. Again, this method of procedure might deprive the maker of the note from making a defense to it against the holder. Suppose, for the sake of the argument, Jacob B. Hertzler had a full defense to the note against the bank, if it should have sued him for its recovery, how could he secure a trial of his rights in the collateral distribution of his son's insolvent estate?

It seems to us that this distribution should have been made among all the creditors, and that any amount which the assigned estate is ordered to pay as a dividend to the Farmers' National Bank of Lititz on this particular note ought to be credited on the full claim which Jacob B. Hertzler holds against his son; Miller & Reist v. Kreiter, to the use of Bomberger, 76 Pa. 78.

The exceptions are sustained and the report is now re-committed with instructions to the auditor to distribute the balance in accordance with this opinion.

Exceptions sustained.

C. P. of Northumberland Co.

Diehl v. Phila. & Reading Railway Co.

Accident at Grade Crossing—Negative Testimony—Motion for New Trial.

In an action against a railroad company for damages for the death of plaintiff's husband in a collision, between a train and an automobile at a grade crossing, where the question of defendant's negligence in not giving sufficient warning and the plaintiff's contributory negligence in failing to "stop, look and listen" before getting on the tracks were submitted to the jury and a verdict for the defendant returned, a new trial will not be granted on the ground that the plaintiff was prejudiced by the charge of the court in referring to the testimony of the plaintiff's witness on the question of defendant's negligence, as negative, where none of her witnesses swore that the "whistle was not blown, or that the bell did not ring," and this testimony was met by the positive testimony on the part of the defendant that the whistle was blown and that the bell did ring.

Summons in trespass.

F. A. Witmer, *Kauffman* and *Little* for plaintiff.

Voris Auten and *J. F. Whalen* for defendant.

March 5th, 1917. MOSER, J.—On the 12th day of June, 1915, Levi Diehl, the plaintiff's husband, was riding with his nephew, Theodore Diehl, in an auto-delivery truck along the public road extending in a southerly direction from the main highway leading from Danville to Bloomsburg, and crossing the tracks of the Philadelphia and Reading Railway Company at grade, near a small station known as Grovania. Theodore Diehl was operating the car. While attempting to pass over this grade crossing the car was struck by a passenger train, running in an easterly direction from Danville toward Rupert, at a high rate of speed, and both men were killed. The plaintiff seeks to recover in this action for the damage she sustained by the loss of her husband.

The trial was proceeded with to the ordinary conclusion. The question as to whether or not the defendant was guilty of a want of due care under the circumstances, as well as the inquiry as to whether or not plaintiff's decedent was guilty of contributory negligence were duly submitted to the jury. The jury rendered a verdict in favor of the defendant. After the charge proper had been delivered to the jury the plaintiff's counsel withdrew the points or requests for charge which had been submitted by them.

The plaintiff has assigned many reasons why her motion for a new trial should be granted. Not all of these reasons were pressed at the argument and they will not be here considered seriatum. Many of them, in reality, complain of the action of the jury. This action was unfortunate to the cause of the plaintiff, but we can see no good reason why fault should be found with the verdict or the work of the jury criticised. The defendant's failure to have given the proper warnings, under the circumstances, would have been its default under the conditions disclosed. That the engine man blew the whistle of the engine at the whistle board,

the accustomed place to give crossing warnings, and that the bell of the locomotive was rung and sounded from the whistle board to the crossing where the accident occurred was shown and proved by a decided preponderance of the testimony. There was also ample testimony to sustain a conclusion that the automobile was not stopped as it approached the crossing but proceeded at a high rate of speed from the turn near the school house, some considerable distance away, to the crossing and upon the track directly in front of the train, thus violating the duty to stop, look and listen.

We fail to see how the plaintiff's rights were prejudiced in the slightest degree by the court saying to the jury that the testimony of the plaintiff's witnesses relating to the blowing of the engine whistle at the whistle board and the ringing of the bell as the train approached the crossing was negative testimony. Not any of the said witnesses swore that the whistle did not blow or that the bell did not ring. Nor did they say that they were looking or listening for some such signal by whistle or bell, as was the case in Kuntz v. Railway Company, 206 Pa. 162, and other decisions cited by the plaintiff.

We have reviewed the reasons assigned by the plaintiff with considerable care and find nothing therein which in our judgment warrants the granting of a new trial. The sufficiency of the warning given, under the circumstances, was for the jury. The surrounding conditions that prevailed at the time and place of the accident, the conduct of the defendant's employees, as well as the conduct of the plaintiff's decedent and all others who were immediately implicated in the unfortunate drama, were all clearly presented, explained and discussed before the jury, thus enabling that body to pass intelligently upon the facts in the case and to consider clearly the issue involved. It was for the jury to say from the testimony, what obstructions interfered with the view of the plaintiff's decedent; what precautionary measures should have been observed by him as he approached the track; what crossing alarms should have been given by the defendant under the prevailing conditions. These matters were all made clear to the jury and the rules of law applicable to the case were sufficiently discussed by counsel and explained by the court to enable the jury to pass intelligently upon every feature of the claim and to arrive at a verdict with a clear understanding of the rights of the parties and the questions at issue.

We are not convinced that there was error in the court's answer to the defendant's request for charge. Some of the points might have been answered more fully but it is impracticable to comment upon every phase of a proposition in connection with each point submitted. Such a requirement would lead to endless discussion and would tend to confuse or obscure rather than to elucidate. From an examination of the testimony and the record it will clearly appear that the court was fully justified in its answers to defendant's requests which were grounded upon the evidence; nor do we think there is error of sufficient gravity in any part of the charge to warrant the granting of a new trial.

The plaintiff's motion for a new trial is hereby overruled and an exception noted.

C. P. of Montgomery Co.

Borough of Norristown v. Puleo.

Borough Ordinances—Licensing Junk Dealers.

The Borough of Norristown enacted an ordinance, reqniring "each person, partnership, association or corporation, engaged in the buying and selling of junk, rubber, rags, rope, scrap iron, brass, lead, copper or other metal, commonly known as junk dealers, to pay an annual license fee of Ten Dollars." The defendant was convicted before a Justice of the Peace of engaging in the business of junk dealer in said Borough without first obtaining a license permit. The justice imposed a penalty of ten dollars. Upon certiorari, HELD, that the proceedings must be affirmed.

The supervision over junk dealers falls within the police power of the State because this power embraces all manner of wholesome and reasonable laws, statutes and ordinances, not repugnant to the Constitution, which the Legislature may judge to be for the good and welfare of the Commonwealth and of the objects of the same. The State has the inherent right to protect health, life and limb, individual liberty of action, private property and the legitimate use thereof, and to provide generally for the safety and welfare of its people.

Certiorari.

Henry M. Brownback for plaintiff.

Irvin P. Knipe for defendant.

September 18, 1917. SWARTZ, P. J.—The Borough of Norristown enacted an ordinance requiring "Each person, partnership, association or corporation engaged in the

buying and selling of junk, rubber, rags, rope, scrap iron, brass, lead, copper or other metal, commonly known as junk dealers, to pay an annual license fee of ten dollars."

The said ordinance also provided for the collection of a penalty before a justice of the peace, from any person who engaged in said business without first obtaining such license.

The defendant was convicted, before the said justice, of engaging in the business of a junk dealer in the Borough of Norristown, without first obtaining a license permit. The justice imposed a penalty of ten dollars.

The defendant sued out a writ of certiorari. In his application for the writ he alleges that the said ordinance is illegal and void and that the justice had no jurisdiction thereunder, to impose the said fine or penalty.

Numerous exceptions were filed to the proceedings, but all were withdrawn, save those which attacked the authority of the borough council to enact the ordinance in question.

That the defendant engaged in the business of a junk dealer, failed to take out a license and incurred the penalty imposed can not be gainsaid, if the borough had the power and authority to enact the said ordinance.

A junk dealer is one who buys and sells old metal, rope and rags.

The defendant conducts his junk business at No. 603 Sandy Street, in the Borough of Norristown.

That the Commonwealth has the right under the exercise of her police powers to regulate the business of junk dealers is well established; Com. v. Mintz, 19 Pa. Superior Ct. 283.

In this case the constitutionality of the Act of April 11, 1899, P. L. 37, relating to keepers of junk shops was involved. The court said:

"The regulation of this class of dealers is within the police power of the state, and the legislative judgment, in prescribing rules and imposing penalties, in conducting such a business, is to be made effectual by the courts, unless it is clearly in violation of the constitution." * * * "The business of keeping a junk shop or second-hand store is a proper subject for legislative control. Such a business appeals to the necessity and cupidity of the needy and criminal classes in furnishing a market for unsaleable articles."

The supervision over junk dealers falls within the police power of the state, because this power embraces all manner of wholesome and reasonable laws, statutes and ordinances, not repugnant to the Constitution which the Legislature may judge to be for the good and welfare of the Commonwealth and of the subjects of the same. The State has the inherent right to protect health, life and limb, individual liberty of action, private property and the legitimate use thereof, and to provide generally for the safety and welfare of its people. The regulation of junk dealers and junk shops falls within the legitimate exercise of the police power of the State to secure the welfare, safety and protection of its people, 8 Cyc. 874; McQuillin on Municipal Ordinances, sections 428, 429 and 430; Powell v. Pennsylvania, 127 U. S. 678. This police power is exercised in prescribing regulations for the good order, peace, health, protection, comfort, convenience and morals of the community.

It is well known that keepers of junk shops require supervision inasmuch as thieves and receivers of stolen property often resort to such places to pledge or otherwise dispose of their ill-gotten gains; Marmet v. State, 12 North Eastern Rep. (Ohio) 471. Such regulations and supervisions are especially necessary in cities and populous communities. Norristown is a borough but has the population of a city.

The power to enact a statute or ordinance under the exercise of the police power necessarily embraces the power to impose a license fee or penalty to enforce the regulation. Without such power the purpose of the ordinance would be defeated and its benefits would be lost to the community.

The contention of the defendant that a junk dealer follows a legitimate business and is, therefore, not subject to any police regulation or supervision, can not be sustained. His judgment may be sound, but it must yield to the legislative mind upon the question unless he can point to some provision of the Constitution that is violated. To refuse recognition of this legislative power is to make the individual judgment superior to that of the Legislature; Com. v. Kevin, 202 Pa. 29; Penna. R. R. Co. v. Ewing, 241 Pa. 590.

If the State may enact such a police regulation, then the question arises, whether the

borough is invested with the authority to pass a valid ordinance of like effect.

The brief submitted by the borough solicitor fully and ably supports the affirmative answer to this inquiry.

That the State may delegate police powers to municipalities, can not be fairly questioned. The doctrine is firmly established and now well recognized, that the Legislature may expressly or by implication delegate to municipal corporations the lawful exercise of police power, within their boundaries. The measure of power is subject to the legislative discretion; 28 Cyc. 693.

"The Legislature may, in the exercise of its police power, empower the authorities of a mnnicipality to make such rules and regulations as they shall deem necessary for the good order of the municipality, to regulate its roads, streets and common sewers, to protect the citizens in their persons and property, and to promote the public health and to ordain penalties for the violation of such regulations and collect the same;" Com. v. Shafer, 32 Pa. Superior Ct. 500, citing a long line of cases in support of the text.

The Borough of Norristown was chartered and created by a special enactment of the Legislature, passed March 31, 1812, P. L. 255. Section 6 declares:

"That it may be lawful for the town council * * * to enact such by-laws and make such rules, regulations and ordinances as shall be determined by a majority of them, necessary to promote the peace, good order, benefit and advantage of the said borough."

This power so granted was repeated in the later Act of April 2, 1831, P. L. 389, Section 5.

The Act of April 7. 1845, P. L. 328, followed and declared in Section 9, that "All ordinances ordained and enacted by the town council of the Borough of Norristown, for the good government and order of said borough, * * * shall have the same force and effect as if enacted by the Legislature of the Commonwealth."

Power to enact ordinances to promote the peace, good order, benefit and advantage of the borough, supplemented by the declaration that ordinances for the good government and order of the borough shall have the force of Acts of the Legislature, bring the authority conferred within the power known as "the general welfare clause." This clause is frequently interpreted as granting the power to pass all ordinances which are necessary to the good order and well being of the municipality; 28 Cyc. 705. It was so interpreted in Borough of Warren v. Geer, 117 Pa. 207. It was there said, that this clause "confers a power that is very broad indeed, and practically includes whatever conduces to the benefit and advantage of the borough and would seem to restrict the limitations upon the exercise of those which require ordinances to be reasonable and not in conflict with the state or federal constitutions."

This case also intimates that without the enactment of the general welfare clause, in favor of the borough, the municipality possesses the necessary authority to pass the ordinances under the common law power incident to all boroughs and public municipal corporations.

The objection to the ordinance that it is unreasonable can not be sustained. The presumption is in favor of its validity.

Our attention was not directed to any matter that can be regarded as a substantial objection to its enforcement. It is not an attempt to collect a tax, under the guise of a police ordinance. The annual license fee of ten dollars is no more than a fair compensation for the services necessary to grant a permit under a proper investigation and for the reasonable supervision of the business by municipal officers. Unless the amount of the license is manifestly unreasonable, the court will not adjudge it a tax; McQuillin on Municipal Ordinances, Section 409.

As already shown, it is both the right and duty of the municipal anthorities to regulate the business of a junk dealer or junk shops, in the interests of the welfare of the citizens and because of the well known fact that the place of business so often becomes a resort for the disposal of goods dishonestly obtained.

The Commonwealth also recognized the temptation it offers to minors to engage in practices that develop criminals. It accordingly enacted a law intended to remove, or at least to lessen this temptation.

The exceptions are dismissed and the judgment of the justice is affirmed.

C. P. of Berks County

Huyett v. Huyett

Divorce—Cruel and Barbarous Treatment —Indignities to Person.

Cruel and barbarous treatment as a ground for divorce consists of such conduct in one of the married parties as to render further cohabitation dangerous to the physical safety of the other, or create in the other such reasonable apprehension of bodily harm as materially to interfere with the discharge of marital duties.

Neglect by wife of household duties, indifference, bad temper, nagging, jealousy and refusal to have sexual intercourse are not such indignities to the person of a husband as will entitle him to a divorce.

Report of master in divorce.

M. Bernard Hoffman for libellant.

June 23, 1917. ENDLICH, P. J.—The conscientious and painstaking master to whom this case was referred has recommended the dismissal of the libel at the costs of the libellant. The latter is asking for a decree of divorce notwithstanding that recommendation. The cause of action averred is cruel and barbarous treatment and indignities to the person. The proofs show that early in the married life of these parties, in 1898, the respondent, being of a jealous disposition, began to charge the libellant, a physician, with being too intimate with his female patients, young girls as well as married women, and recklessly accused him of infidelity with these patients, even in their presence and in the presence of visiting relatives, humiliating him and and injuring his practice of medicine by causing such patients to withdraw from his care and treatment. These disputes arising in connection with the libellant's general practice led him to engage in the special work of eye, ear, nose and throat treatment, which he is at present pursuing. The respondent became indifferent towards the libellant, slovenly about the kitchen, and whenever the libellant had a confinement or a gynecological case to treat she would refuse to act towards her husband as a wife should and to have intercourse with him. On many occasions she would not speak to him. Libellant became ill by reason of this treatment affecting his nervous system. Of this state of facts the master in his report says:—

"An examination of the entire testimony fully justifies a finding that the respondent was an extremely jealous and petulant woman, and bad though her conduct was, it at no time measured up to the statutory requirements, supported by the authorities, as to what constitutes cruel and barbarous treatment and indignities to the person. What cruel treatment consists of is: "Such conduct in one of the married parties as to render further cohabitation dangerous to the physical safety of the other, or create in the other such reasonable apprehension of bodily harm as materially to interfere with the discharge of marital duties. * *' Neglect of household duties, indifference, bad temper, nagging and jealousy are not such indignities to the person of a husband as will entitle him to a divorce; and as to the allegation that the respondent refused to have sexual intercourse with the libellant, it is sufficient to refer to Johnson v. Johnson, 31 Pa. Super. Ct. 53; Pratt v. Platt, 38 id. 551. * * The testimony exhibits a state of domestic infelicity, but it does not present a case of cruel and barbarous treatment by the wife of her husband, or indignities to his person, which rendered his condition intolerable and life burdensome within the meaning of the statute. To entitle a libellant to a divorce it is necessary for him fully to sustain by the testimony the cause as set forth as the grounds thereof and no other."

A careful review of this record as returned by the master has satisfied us that depositions of the witnesses amply sustain his findings of fact, and the decisions cited by him his views of the law resulting therefrom. Nor does the decision of the Superior Court in Ponthus v. Ponthus, 66 Pa. Super. Ct. 257, published since the master's report was filed, declare any different doctrine. It was there ruled that in a divorce proceeding by the husband for cruel and barbarous treatment and indignities to his person, each of these constituted a distinct ground of divorce; that it was not indispensable to establish both of them; but that one, if sufficiently made out, was enough to justify a decree. Here the finding of the master is that neither the one nor the other is adequately proven by the testimony. It further appeared in that case that the wife had, not on rare occasions, or merely privately, but persistently and in the presence of their associates, accused the husband "not only of conduct most disgusting and degrading, but of crimes, the punishment of which would have been imprisonment for long terms,"—the charge made being, as intimated by the court, of such a character that it did not feel warranted in repeating them. Under these

circumstances it was held that it was not necessary, as assumed by the master in that case, for the husband to prove express malice in the wife's assertions. No such requirement was made by the master in this case. Indeed, the case cited, carefully scrutinized, seems to be entirely consistent with the disposition recommended in the present one.

The report of the master is approved and the libel dismissed at the costs of the libellant.

C. P. of Lackawanna Co.

Live Stock Ins. Co. v. Patterson.

Appeal nunc pro tunc—Laches.

Where a defendant in a suit before a justice of the peace fails to take an appeal within twenty days, and depositions show that he had notice of the case on the return day of the summons and made no effort to appeal until after execution issued, he is guilty of laches and an appeal *nunc pro tunc* will be refused.

Rule for an appeal *nunc pro tunc.*

C. A. Battenburg for rule.

Price, Price & Price, contra.

January 2nd, 1917. EDWARDS, P. J.—Waiving the question of our jurisdiction to entertain the motion for relief in this case, we conclude that the defendant, upon the merits of his contention, is not entitled to have an appeal *nunc pro tunc.* He claims that he was misdirected by the alderman, and that in consequence of the misdirection he failed to take the necessary steps to procure an appeal. The depositions show no misdirection ou the part of the alderman. Defendant himself testifies as to what happened in the alderman's office on the return day of the summons. According to his testimony he told the alderman that "he had notice of a case there." The alderman, after going back to the desk, said: "I will tell you the easiest way out of this is to take out an appeal, and there will be nothing of it." Defendant proceeds thus: "So I thought to myself I am wasting time running around here; and when I don't owe the people anything, so I didn't go right there again; it slipped my memory, and I didn't do anything more until this man," etc., referring to the execution. This statement, if it proves anything, proves a suggestion of an appeal, rather than any misdirection on the part of the alderman. As to the allegation that there was nobody present on the return day representing the plaintiff, we find that it is not sustained. The evidence of the alderman is specific on this point. Mr. Battenburg, the attorney, was present, and Mr. Dean, the secretary, was sworn, the defendant being in default.

The only conclusion we can reach in this case is that the defendant has been guilty of laches. He has not exercised that diligence necessary to secure the preservation of his right of appeal. It is true, as was stated in McIlhaney v. Holland, 111 Pa. 634, that "if without fault of his a party desiring to appeal from a judgment of a justice of the peace is prevented from so doing by the act of the latter, an appeal may be allowed *nunc pro tunc*, if asked for in reasonable time." However, in the case at bar, the defendant was not misled. He simply forgot the case until his memory was revived by an execution.

The rule is discharged.

ORPHANS' COURT

Frey's Estate. No. 2.

Wills—Devise of Income—Bankruptcy—Sale of Interest.

F. devised the "remainder of the share of each child" to his executors "in trust * * * the income as it accrues to be paid to each child * * * and at the death of either child the principal shall go to his or their then surviving children." One of the legatees becoming bankrupt, the trustees sold her interest and the auditor distributing the accumulated income in the hands of the trustee, awarded the same to the purchaser. Exceptions being filed to such award, HELD, that the exceptions must be dismissed.

No improvidence on the part of the legatee and no inability to manage her business affairs, being shown, the only intent of the testator appears to have been to provide a safe investment by his executors of about one-half of the legatee's share, paying the income to her and the principal to her children.

He used no technical language that would prevent his daughter from assigning her income as it accrued and there was nothing said by him, so far as the will divulges, that would indicate that he was averse to her prospective husband sharing in the benefit of the accrued income.

Frey's Estate, 25 YORK LEGAL RECORD 141, followed.

Exceptions to Auditor's report.

For a previous construction of this same will, see Frey's Estate, 25 YORK LEGAL RECORD 141.

When the account there ordered to be filed was finally confirmed, V. K. Keesey

was appointed auditor to distribute the balance in the accountant's hands. To his report, exceptions were filed.

R. P. Sherwood for exceptions.

Niles & Neff, contra.

November 5, 1917. Ross, J.—The facts in this case have all been agreed upon and are attached to the auditor's report.

They are in part as follows:

The decedent died September 7th, 1882, leaving a will, which was duly probated, providing *inter alia*, that at the death of his widow all his estate, not specifically devised or bequeathed, shall be divided between his children, Benton S. Frey, Emma Eisenhart, Mary Frey and the living children of a deceased daughter, who had been married to E. Myers, in equal shares. Then in the following language: "Twenty-five thousand ($25,000) dollars of the share of my estate herein devised and bequeathed to each of my daughters and to my son respectively, on my wife's death, including the house and lots devised to them respectively, shall be at the absolute disposal of each daughter and of my said son. But the remainder of the share of each daughter and of my son, shall be held in trust by my executors, and by them invested in the registered loan of the United States or of the State of Pennsylvania, and the income as it accrues, paid to each daughter and to my son respectively so long as they shall respectively live.

"At the death of either daughter or of my said son, the principal shall go to her or his then surviving children, and if the son or daughter so dying shall leave no surviving children, then the said principal shall go to my heirs in the shares they would be entitled to receive under the intestate laws."

Under the facts agreed upon it is evident that at the time the testator made his will, he knew that Mary Frey, one of the daughters named in the will, was engaged to W. T. Nelson. It is also a fact that she afterwards married the said W. T. Nelson, and that two children were born and are now living."

Mary Nelson, nee Frey, on March 13, 1909, was adjudged a voluntary bandrupt by the District Court of the United States of America for the Middle District of Pennsylvania, and subsequently a trustee in bankruptcy sold the interest of said bankrupt in the said trust fund at public sale to Harry E. Frank; which said sale was duly confirmed by said District Court, and said trustees conveyed to said Harry E. Frank all of said bankrupt's interests therein.

The surviving testamentary trustee, Kerwin L. Eisenhart, filed his account of said trust in the Orphans' Court of this county, showing, *inter alia*, a balance of income in his hands of $976.58.

That account was absolutely confirmed by this court and at the request of all interested parties the said Kerwin L. Eisenhart was discharged and the Security, Title and Trust Company of York, Pennsylvania, was appointed trustee under the will.

The said Eisenhart paid over to his succeeding trustee, the Security, Title and Trust Company, the said balance of $976.58, and this balance was distributed by the auditor appointed by this court, after deducting expenses of the audit, to Harry E. Frank, the said purchaser of the interests of Mary Nelson at the said public sale of the trustee in bankruptcy.

Before the Auditor, Mary Nelson claimed the said balance, and alleged as the foundation of her claim that the money should come to her as it was money which accrued for her under the hereinbefore quoted provision of her deceased father's will, which she contends, through her attorney, created a "separate use trust," and also contends that if it was not willed as a "separate use trust," the provision of the will amounts to, and is a provision which created a "spendthrift trust."

The claims seems to have been strenuously urged before the Auditor whose report to this Court indicates the extraordinary care and study with which he has analyzed the rather complex history of the trust funds in question.

After a careful reading of his report and a tedious study of the authorities, the Court agrees with his conclusions.

A study of the will and the surrounding circumstances at the time of the execution of the will, fails to discover any indication that the testator had any intention of making an independent provision for his daughter Mary. It is rather apparent that he desired to keep the bulk of his accumulations in the Alexander Frey blood after it had served and benefitted his then living descendants by invoking the intestate law, in the event of the death of his immediate descendants without issue.

He used no technical language that would prevent his daughter from assigning her income as it accrued and there was

nothing said by him, so far as the will divulges, that would indicate that he was averse to her prospective husband sharing in the benefit of the accrued income. At the time the will was executed it was settled law that the husband would be entitled to its benefits; Torbet v. Evans, 1 Yeats 432; Evans v. Knorr, 4 Rawle 72; Heck v. Clippinger, 5 Pa. 387.

It is not necessary to add anything to the Auditor's very comprehensive report in explanation of his rulings on hoth branches of this case.

That the provision in the will is not a spendthrift clause, has been clearly decided by this Court in an opinion rendered by the late Judge Bittenger; Frey's Estate, 25 Y. L. R. 141. In that opinion is cited the case of Kunkel v. Kemper, 32 Pa. Sup. Ct. 360. Those cases plainly illustrate the principles, which we think, are applicable to the contentions now advanced by the claimant.

The exceptions filed by Mary Nelson to the report of the Auditor are dismissed and the report is hereby confirmed.

O. C. of Delaware Co

Wells' Estate

Decedents' Estates — Decedents' Debts — Claim for Nnrsing—Family Relationship —Presumption of Gratuitous Service— Contract—Burden of Proof.

Where a sister lives with a brother under a promise that he would give her a home, and while she is thus living with him he becomes ill, the sister is not entitled to compensation and a claim against the brother's estate will not be sustained.

In such case a statement by the brother that he wanted the sister to have something, is not sufficient to establish a contractual relation.

Where services are rendered there is an implied contract to pay for them, excepting in case of parent and child, or where a condition of family relationship is shown to have existed.

Family relationship is such living together in a common abode, that services may reasonably be expected by the recipient to be gratuitous, and may also be considered by the giver to be without the expectation of compensation.

Exceptions to report in estate of Moses Wells, deceased.

W. C. Alexander for exceptions.
Garrett E. Smedley, contra.

March 14, 1917. BROOMAL, J.—The auditor has allowed a claim of Mary J. Burk against the decedents' estate, amounting to one hundred and sixty-four dollars, and this is excepted to. It appears from the auditor's report that the claimant is a sister of the decedent. She came to live with him five years before his death, under a promise that he would give her a home as long as he lived. While thus living with him, and after he became sick, she performed services for him by giving him his medicine, taking care of his room, sitting up with him at nights and attending to the commode. These services extended from February 1, 1913, to March 1, 1914, less two weeks, and again from March 24, 1914, to May 24, 1914. Evidence was submitted tending to show that during the first period these services were reasonably worth three dollars a week, and that during the second peried, one dollar per week. The decedent died on December 29, 1914. There was evidence that upon an occasion, date not given the decedent said he wanted the claimant to have something, but this is nothing more than an expression of an intention. It is no evidence of a contract; Gerz's Exrx. v. Demarra's Exors., 162 Pa. 530. The decedent by a codicil to his will, dated May 24, 1904, bequeathed to the claimant one hundred and fifty dollars, and by another codicil, dated February 17, 1913, he revoked it. It may be that the declaration that he wanted the claimant to have something was while this bequest was in force. If so, the revocation was a change of intention. There was no evidence of any demand by the claimant to the decedent for payment for these services.

It is a general rule that claims against decedents' estates should be critically scrutinized. In Carpenter v. Hays, 153 Pa. 432, it was said by Justice Mitchell, "Claims against a dead man's estate, which might have been made against himself, while living, are always subjects of just suspicion and our books from Graham v. Graham, 34 Pa. 475, to Miller's Estate, 136 Pa. 249, are full of expressions by this court of the necessity of strict requirement of proof and the firm control of juries in such cases." In the absence of proof of any express contract, this claim must rest upon the implied assumpsit arising upon proof of the performance of the services. The relation

of the parties does not rebut the presumption, except in the case of parent and child; Gerz's Exrx. v. Demarra's Exrs., *supra.* Or where a condition of family relationship is shown to have existed; Shuhart's Estate, 154 Pa. 230; Evans' Estate, 60 Pa. Supr. Ct. 83. As to a family relationship, the burden of showing it was upon the decedent's estate; Casky v. Cineavy, 60 Pa. Supr. Ct. 87. What is meant by family relationship as distinguished from family kinship is such a living together in a common abode, as that the services might reasonably be expected by the recipient to be rendered gratuituously, and might likewise be considered by the giver to be given without the expectation of compensation.

This is not the case of a domestic servant, where wages are presumed to have been paid as they are earned in accordance with the rule announced in McConnell's Appeal, 97 Pa. 31. The claimant was a sister of the decedent, and her services were those of a nurse. Such person is not a domestic servant; Ranninger's Appeal, 118 Pa. 20; Lewis' Estate, 156 Pa. 337; Davies' Estate, 60 Pa. Supr. Ct. 360.

The pivotal question therefore is, were these services gratuitous. The pertinent facts from which this question must be solved are these. Those in her favor are, she rendered the services to an invalid brother who received them. The decedent said he wanted her to have something. The auditor who heard the witnesses has approved her claim. The facts against her are, she was an inmate of the decedent's abode, without charge, having made her home with him for several years. She was not paid for any of her services. She made no demand for compensation at the end of her periods of service. She made no demand of the decedent in his lifetime.

The evidence to support such claim should be clear, distinct and convincing; Winnings v. Hearst, 17 Pa. Supr. Ct. 314; Coulston's Estate, 161 Pa. 161.

The conclusion is irresistible that when the claimant, making her home with her brother, without charge, performed the kindly offices for her invalid brother, which constitute the services for which the claim is now made, she did so without expectation of compensation, and that while the decedent thought that neverless she ought to be compensated he did not think so to the extent of carrying such thought into execution.

We therefore sustain the exception.

Martin's Estate.

Will—Construction—Children of Deceased Brothers and Sisters.

Testator bequeathed the residue of his estate "to my brothers and sisters,or their heirs, in equal shares, the child or children of any deceased brother or sister to take by representation of his, her, or their parents." The auditor distributed the fund to the surviving brother and sisters and to the children of a deceased brother and sister. HELD, that exceptions filed to his report must be dismissed.

The contention that the testator meant to give his estate only to the child or children of such brother or those sisters who were living at the time he executed his will cannot be sustained.

A study of the whole will and the language used by the testator impels the conclusion that the testator did not intend to exclude the children of any of his deceased brothers or sisters from the share which their deceased parent would have been entitled to had they survived him.

Exceptions to Auditor's report.

R. P. Sherwood for exceptions.

V. K. Keesey, contra.

November 5th, 1917. Ross, J.—In his will the decedent provided *inter alia* as follows: "And after the payment of all collateral inheritance taxes upon all moneys hereinbefore given and bequeathed to any person, or for any purpose whatsoever, I direct each of said trust companies to pay the balance of the moneys belonging to my estate which shall then be in their hands, and which I intend shall be the whole of my estate not hereinbefore especially bequeathed, to my brothers and sisters, or their heirs, in equal shares, the child or children of any deceased brother or sister to take by representation of his, her, or their parents."

The will was executed January 12th, 1912.

The testator died December 31st, 1913.

At the time of his death there survived him, Ida Livingston, Kate Peters and Sarah A. Martin, sisters, and Samuel H. S. Martin, a brother.

One of the decedent's sisters, Malinda Miller, died in 1904, leaving to survive her, two children who are still living, namely, Martin M. Miller and Leah Catharine Miller; and one brother, David Martin, died January 2nd, 1910, leaving to survive him six children, who are still living, namely, Beatrice Snyder (nee Martin), Austin Martin, Walter Martin, Ralph D. Martin, Beulah E. Martin and Lucy E. Wilson (nee Martin).

The exceptions are dismissed and the report of the Auditor is hereby confirmed.

Before the auditor the three surviving sisters and the one surviving brother claimed all the residuary estate, contending through their attorney, that they, and they only, were entitled thereto, in exclusion of the "child or children of any of the deceased brother or sister of the decedent."

The auditor found that, "the testator clearly intended that the residue of his estate should be paid to the same persons who would have inherited it had he died intestate, leaving no widow, issue or parent, that is, to the surviving brothers and sisters and the children of any brothers and sisters who had predeceased him, the latter to take their deceased parents' share," and he accordingly awarded the balance on the account, after deducting the costs of audit.

The ruling of the auditor is the subject of the exceptions on the part of the surviving brother and sisters of the deceased.

They now contend that the testator intended by his will to give all the residue of his estate to the brothers and sisters who survive him, and none of it to the children of any of his deceased brothers and sisters.

The able attorney who argues to sustain the exceptions says that the direction in the will that, "the child or children of any deceased brother or sister to take by representation of his, her or their parents," must be construed that the testator meant, "only the child or children of that brother or those sisters who were living at the time he executed his will." We cannot agree with the counsel in that interpretation. A more reasonable, just and equitable interpretation was rendered by the auditor.

The language used in the opinion rendered by the Supreme Court in the case of Sorver v. Berndt, 10 Pa. 214 (cited by the auditor) is applicable here, "It is doing no violence to the will to construe 'or' as 'and,' and it was doubtless used in that sense by the testator." The analysis by the auditor of the language used in the will is entirely reasonable and his conclusions do not violate any of the established rules for the construction of wills.

A study of the whole will and the language used by the testator impels the conclusion that the testator did not intend to exclude the children of any of his deceased brothers or sisters from the share which their deceased parent would have been entitled to had they survived him. The logic of the Auditor's report fully demonstrates this conclusion.

An exception is hereby entered for the exceptants, if they desire it.

O. C. of Allegheny Co.

Hunkley's Estate.

Descent and Distribution—Husband's Life Estate—Wife Without Kin—Charitable Uses—Failure of—Act of April 8, 1833, P. L. 313.

Where a married woman devised her real estate to her husband for life with remainder to charitable uses, and died without issue or known kindred, and the charitable uses failed, the husband took a fee simple estate and on his death it descended to his heirs. Section 12 of the Act of April 8, 1833, P. L. 313, prevented its escheat to the Commonwealth.

Exception to accountant's report.

H. R. Phillips for accountants.

Clarence Burleigh, Jr., and *Diamond & Zacharias* for heirs.

July 7, 1917. MILLER, J.—The question is the right of a husband's heirs, he being devised a life estate, to take land in fee in the absence of heirs or known kindred of the wife.

The decedent died January 28, 1914, testate. By her will she devised to her husband her real estate for life, "and after his death to be sold by my executors hereinafter named, and the proceeds of such sale to be equally divided between the St. Paul's Orphan Asylum at Crafton and the German Roman Catholic Orphan Asylum of Allegheny County," with power after the husband's death in the executor to sell for the purpose named; and also with direction, should a reasonable offer for said real estate be received during the lifetime of her husband, that the executor should sell, in which case the husband should receive one-half of the purchase price in lieu of his life estate, the other half to be divided as directed by the previous portion of the will.

The husband, Frank Hunkley, died April 7, 1916. The real estate had not been sold during his life; after his death, the executor sold the same, filed his account thereof, and the balance for distribution is the proceeds of said sale.

The decedent died within a day or two after the making of her will. She left no lineal descendants, father, mother, brother, sister, nephew or niece, nor any other known kindred, excepting her busband.

At the audit of her husband's estate his heirs or kindred were fully set forth and their names are offered as distributees in this estate.

The purpose for which the land was to be sold failed, by reason of the death of the

testatrix within thirty days, as provided by Section 11 of the Act of 1855, P. L. 332. As she made no provision for her residuary estate and as the charitable institutions named cannot take, she died intestate as to this real estate and the parties entitled thereto must be ascertained under the intestate law, and, if there be none, the fund must escheat to the Commonwealth.

Section 10 of the Act of April 8, 1833, provides: "In default of known heirs or kindred competent as aforesaid, the real estate of such intestate shall be vested in his widow, or, if such intestate were a married woman, in her surviving husband, for such estate as the intestate had therein; and in such case, the widow shall be entitled to the whole of the personal estate absolutely." Section 12 of the same act provides: "In default of all such known heirs or kindred, widow or surviving husband as aforesaid, the real and personal estate of such intestate shall go to and be vested in the Commonwealth by escheat."

It will be observed that Section 12 prevents the escheat of an estate, if there was a surviving spouse; and that Section 10 vests the estate of the intestate in the surviving spouse in default of known heirs or kindred.

In Broadtop Coal & Iron Co. v. Riddlesburg Coal & Iron Co., 65 Pa. 435, it was decided that where one died seized of land, intestate, without issue or known collateral kindred, leaving a widow, the land passed to her under Section 10 of the Act aforesaid. Under this authority and the further doctrine in Lufberry's Appeal, 125 Pa. 513, and Mudersbaugh's Estate, 131 Pa. 278, the fund should be awarded to the personal representative of Frank Hunkley's estate; but as his estate has been audited, debts paid and his next of kin ascertained, there seems no necessity for awarding it to his personal representative. Therefore, it may be decreed to his kindred as shown in the audit of his estate, directly.

O. C. of Delaware Co.

King's Estate.

Wills—Construction of Will—Bequest of Money in Bank.

Testatrix bequeathed by one clause in her will specific portions of sums deposited in three banks which she named, to a sister and a nephew, and in the same clause willed, "and the remainder in the banks to my brother." She had funds deposited in two other banks. HELD, that the brother took only the balance in the three banks specifically named in that clause.

Exceptions to auditor's report in the estate of Mattie H. King.

Robinson, Marsh & Kauffman for exceptions.

W. C. Alexander, contra.

May 9, 1917. BROOMALL, J.—The only question which is pressed to the attention of the court is whether the construction which the auditor gives to the sixth clause of the will of the decedent is correct.

This clause is as follows; "I give and bequeath of my money now lying in the Philadelphia Saving Fund, Seventh and Walnut, The Western Saving Fund, Tenth and Walnut, and the Union Trust Company, Chestnut Street, Philadelphia, to my sister, Georgie E. Windle, of Seattle, Washington, five hundred dollars, and to my nephew Robert Henry Windle, of Seattle, Washington, son of George E. Windle, the sum of two hundred and fifty dollars, and the remainder in the banks to my brother, Robert Palmer Metz."

At the date of the will, the decedent had on deposit in the three banks named about thirteen hundred and fifty dollars and had on deposit about twenty-one hundred and fifty dollars in the Real Estate Title Insurance & Trust Company and the First Penny Savings Bank. The exceptant contends that the remainder referred to in the will includes these moneys. The auditor did not agree with him, and in this conclusion, we think he is right.

In this sixth clause the testatrix starts off to dispose of the moneys in the three banks named. She says, "of my money now lying in" naming three banks she bequeaths two legacies amounting to seven hundred and fifty dollars. This leaves a remainder. There is no other remainder suggested than the remainder in the three banks after deducting seven hundred and fifty dollars. This is the remainder which she bequeaths in the same clause in the words, "and the remainder in the banks to my brother, Robert Palmer Metz."

We therefore enter the following decree:

It is ordered, adjudged and decreed that the exceptions to the auditor's report be dismissed; that the auditor's report be confirmed; and that distribution be made in accordance therewith.

QUARTER SESSIONS

Q. S. of Lackawanna Co.

Com. v. Boero.

Constitutional Law—Title of Acts—Expressing Subject in Title—Possession of Ferret—Act 1915, P. L. 146.

Section 9 of Act April 21, 1915, P. L. 146, prohibiting the breeding or selling of ferrets, or having such animals in possession, except by license from the State Board of Game Commissioners, and providing penalties for the violation thereof, is strictly and closely germane to the subject matter of the act as expressed in the title, and is therefore not in violation of Section 3, Article 3, of the constitution.

Appeal from summary conviction.

Geo. W. Maxey, District Attorney, for Commonwealth.

Taylor & Lewis, for Defendant.

EDWARDS, P. J., July 2, 1917.—Defendant was convicted before an alderman of the city of Scranton on a charge of "having in his possession a ferret without first having obtained a license from the Board of Game Commissioners of the Commonwealth." There are no facts in dispute. It is admitted on behalf of defendant that he was in possession of such an animal and that he had no such license.

The only defense suggested is that section nine, of the Act of April 21, 1915, P. L. 146, passed for the better protection and preservation of game, etc., is unconstitutional because the title gives no notice tbat being in possession of a ferret is unlawful. There is no question about the law applicable in such a case. The title of a bill, being intended to give notice of the proposed legislation, must express the purport of the Act with sufficient definiteness to notify those who may be affected by the Act of its real purpose. Where the title imports one subject, while the bill itself shows a different subject to be its purpose, the title is misleading, and the Act is unconstitutional; Rogers v. Manufacturers' Improvement Co., 109 Pa. 109. In framing the title of an Act of Assembly, there is a danger of being too minute and circumstantial; and, along this line, we have many cases which decide that it is not necessary that the title should be a complete digest of the contents of the act. It is sufficient if it fairly and clearly gives notice of the subject matter so as reasonably to lead to an inquiry into the body of the act.

There are several other states that have, in substance, the same restriction that Pennsylvania has as to the titles of acts of assembly. We notice the simple language used in the constitution of New Jersey: "To avoid improper influences which may result from intermixing in one and the same act such things as have no proper relation to each other, every law shall embrace but one object, and that shall be expressed in the title." The Iowa constitution requires that "every law shall embrace but one object, which shall be expressed in its title." The provision in the Maryland constitution is that "every law enacted by the legislature shall embrace but one subject, and that shall be described in the title." We refer to these constitutional clauses from the states named because the courts of these states, in several decisions, emphasize the inquiries: Does the title embrace one subject only? Is that subject clearly expressed? And are the provisions of the statute, in its several sections, incidental and germane to the subject and upon matters properly connected therewith?

The title of the act now under consideration is as follows:

"An Act for the better protection and preservation of game, game quadrupeds and game birds in Pennsylvania, and prescribing penalties for violations of its several provisions." The act contains twelve sections and is comprehensive in its scope. It prohibits hunting on Sunday; it prescribes the open season for wild turkey, grouse, pheasant, quail, raccoon, bear, deer, etc., etc.; it provides that certain sales of game are unlawful, that no one can hunt for wages or hire, that game shall not be shipped by parcel post, express, freight, etc., except under certain conditions, and it has several other provisions properly relating to the subject matter expressed in the title. It is the ninth section of the act that defendant claims is unconstitutional. This section reads as follows:

"That from and after the passage of this act, it shall be unlawful for any person in this Commonwealth to breed or sell ferrets, or in any manner to offer to sell ferrets, or to have such animals in possession, except by virtue of a license to be issued by the

Board of Game Commissioners of this Commonwealth; which said license may be issued by the Board of Game Commissioners, upon application made by any person, and the payment of twenty-five dollars upon the part of a dealer of or dealer in ferrets, and one dollar upon the part of such person as may desire to own a ferret without breeding same. Each and any person violating any provision of this section shall, upon conviction, be liable to a penalty of twenty-five dollars for each ferret bred for sale, sold, or in any manner offered for sale or had in possession, contrary to the provisions of this section. Each and every ferret found in possession of any person in this Commonwealth contrary to the provisions of this section shall, upon conviction of such person or his acknowledgment of guilt, be immediately destroyed by any officer of the State whose duty it is to protect the game and wild birds of this Commonwealth; and it shall be the right of any citizen of the Commonwealth to kill a ferret when found at large and beyond the control of its owner."

It seems very clear to us that the provision as to ferrets, the breeding of ferrets, or having ferrets in one's possession, is strictly and closely germane to the subject matter of the act as expressed in the title. An act for the better protection and preservation of game would be incomplete without some provision relating to ferrets. Every hunter knows this. And everybody knowing anything about wild game, or interested in the wild life of field and forest, would reasonably expect to find such a provision in such an act of assembly.

The appeal is dismissed.

Q. S. of Schuylkill Co.

Com. v. Walburn.

Divorce—Support of Children.

The duty of supporting, maintaining and educating children rests upon the father and during the lifetime of the father the mother is not bound to support the children.

The husband remains liable for the support of his minor children where he and his wife voluntarily separate and he consents that the children live with the mother or where the wife leaves him on good cause. But, it is otherwise where the wife leaves without sause taking the children with her.

When the father and mother are divorced and the mother marries taking with her her children by her divorced husband, the stepfather is entitled to the services of such children and obliges himself to support, maintain and educate such children.

When a child is deserted by both parents the primary responsibility for its support rests on the father.

M. H. Spicker for Commonwealth.

Roscoe R. Koch for Defendant.

September, 1917. KOCH, J.—The prosecution in this case is based upon the information of Mary Miller, the grandmother of Margaret Walburn, aged four years, a minor child of the defendant. The child's mother is a daughter of said Mary Miller. Mr. and Mrs. Walburn were married in December, 1911 and Margaret was born in May, 1913. The Walburns did not get along very well together, owing to the husband's suspicions of his wife's infidelity and he left her in September, 1912. She prosecuted him for non-support in 1914, and, at the May Sessions of that year, we directed him to pay to his wife the sum of Eight Dollars per month, intended to be for the support of the child. In June, 1914, the defendant began proceedings in divorce on the ground of his wife's adultery and obtained a decree of divorce in October, 1914. The divorced wife married again about five weeks ago and her child, Margaret, has been living with its grand-mother, the prosecutrix, ever since. The defendant does not want to support the child, because he claims he is not its father and also because its mother has married again and has had control and custody of the child from the date of its birth.

A child having been begotten and born in lawful wedlock is presumed to be legitimate and no sufficient evidence to overcome that presumption was made to appear in this case. The statutory law of this state makes it obligatory upen parents to support their minor children and it also provides the means of compelling a husband and father to support his wife and minor children. Primarily, the duty of supporting, maintaining and educating children rests upon the father; and, during the lifetime of the father, the mother is not bound to support the children; 29 Cyc. 1606; Henkel's Estate, 13 Superior Court 337-343.

A husband remains liable for the support of his minor children where he and his wife voluntarily separate and he consents to the children living with the mother, or where the wife leaves him for good cause. But it is otherwise where the wife leaves without

cause taking the children with her; 29 Cyc. 1607.

In this case, the child is rather unfortunate for it virtually now stands deserted by both of its parents, and we cannot compel its stepfather to support it. Had the stepfather admitted Margaret to his home when he married her mother, he might be responsible for her maintenance and support. Chancellor Kent says in the Second Volume of its "Commentaries on American Law," page 192, that, if a stepfather takes his wife's children into his own house, he is then considered as standing in loco parentis and is responsible for the maintenance and support of the child so long as it remains with him, for by that act, he holds the child out to the world as part of his own family. In Lantz vs. Frey and wife, 14 Pa. 201, "The defendant intermarried with the female plaintiff's mother, after which the child went to reside in the family of her stepfather, until she herself married. By this arrangement, the defendant stood in loco parentis, and was responsible for the maintenance and education of the child so long as she continued to reside with him; 2 Kent. Com. 192; Stone vs. Carr, 3 Esp. Cas. 1; Cooper vs. Martin, 4 East 76."

The assumed relation of father by a stepfather entitles him, on the one hand, to the services of his stepchildren and entitles them, on the other, to their support and education without remuneration; Duffy vs. Duffy, 44 Pa. 402. A stepfather cannot recover for maintaining his stepchild unless he can prove a contract with the guardian; Ruckman's Appeal, 61 Pa. 251. In Douglas' Appeal, 82 Pa. 173, Mr. Justice Sharswood said, "The opinion of the court in Duffy vs. Duffy, 8 Wright 402, is direct to the point—that when a stepfather takes his stepchildren to reside with him as one of his family, while the one cannot claim for services, the other is precluded from compensation for expenditures." But a stepfather is under no legal obligation to support a stepchild after the death of the mother; Brown's Appeal, 112 Pa. 18.

In Fitler vs. Fitler, 33 Pa. 50, the wife of Fitler deserted him and took her child with her. The husband later obtained a divorce on the ground of desertion and the mother brought an action of assumpsit for money expended in supporting and maintaining the child. The father was able and willing to receive and support the child and it was held that the wife was, under the circumstances, not entitled to recover. The court said, "While she keeps it, on such grounds, she has no claim for compensation." When the divorce was granted no order was made respecting the custody of the child.

In the case before us, the child appearing to be deserted by both its parents, I have no doubt that the primary responsibility for its support, under such circumstances, now rests on the father.

The defendant is therefore directed to appear in open court to hear and receive whatever order the court may then conclude to make in the premises.

COMMON PLEAS

C. P. of Northumberland Co.

Borough of Sunbury v. Northamberland County Gas and Electric Company.

Equity—Equity Jurisdiction—Public Service Company—Municipal Light Contract.

Where the subject matter of a suit between a borough and a light company is a contract wherein it is provided that "it is mutually agreed by and between the parties hereto, for themselves and their and each of their successors and assigns that this contract shall go into effect on the thirtieth day of January, A. D. one thousand nine hundred and eleven and shall expire on the thirtieth day of January, A. D. one thousand nine hundred and sixteen: provided, however, that the borough may at its option renew this contract for another period of five years from the thirtieth day of January, A. D. one thousand nine hundred and sixteen, under the terms and conditions hereof." HELD, the word "renew" as used in the contract should be coustrued to mean, "to continue," or "extend."

Where the borough elects to exercise its option to renew, no additional contract or writing is necessary to continue in force the provisions of said contract.

In such a case the jurisdiction of the Equity Court is not ousted by the Public Service Act of July 26, 1913, P. L. 1374.

Bill in Equity.

Motion to dismiss the bill.

J. P. Carpenter for plaintiff.

J. Fred. Schaffer for defendant.

MOSER, J.—In this case the jurisdiction of the court is challenged by the defendant

who contends that the plaintiff has no contract with the defendant, and that the question raised by the pleadings is one of service by a Public Service Corporation over which the Public Service Commission has exclusive jurisdiction. In the agreement between the parties it is provided: "Third. It is mutually agreed by and between the parties hereto, for themselves and their and each of their successors and assigns, that this contract shall go into effect on the thirtieth day of January, A. D. one thousand nine hundred and eleven and shall expire on the thirtieth day of January, A. D. one thousand nine hundred and sixteen; provided, however that the borough may, at its option, renew this contract for another period of five years from the thirtieth day of January, A. D. one thousand nine hundred and sixteen, under the terms and conditions hereof."

On the 26th day of May, A. D. 1916, the Borough Council of the Borough of Sunbury passed the following resolution: "Whereas, the Borough of Sunbury has the option, under said contract, to renew the same for another period of five years from the date of the expiration of said contract, viz.: January 30, 1916, now, therefore, be it resolved that the Borough of Sunbury will and doth hereby elect to exercise its said option to renew the said light contract for a period of five years from the 30th day of January, 1916." Notice of this action of the Borough Council was served upon the president of the Northumberland County Gas & Electric Company, the successor to the Edison Electric Illuminating Company, and was accepted by him on the 28th day of January, 1916.

Thus the contract between the parties to this action that went into effect on the thirtieth day of January, A. D. 1911, has been in force continuously from thence hitherto. It was the evident intention of the parties that the word renew was used in the agreement, and was understood by them to have been used to mean "continue" or "extend."

The understanding of both parties was that if the Borough desired, the identical contract might be continued for an additional five years. There was no thought of another or a new agreement or writing being entered into. The particular contract was to continue in force; the parties had no other additional contract in contemplation. The right to renew or extend was an integral part of the contract itself and when the option was exercised the identical contract was continued for a period of five years; Harding v. Seeley 148, Pa. 20.

In this case the question is not one of service by a public service company which gives the Public Service Commission exclusive jurisdiction. In the case of Bellevue Borough v. The Ohio Valley Water Company, 245 Pa. 114, it was held that a contract as to water rates which was indeterminate or unlimited as to time was not binding in the face of the declared statutory policy of the law that the Public Service Commission shall have power to inquire into and determine the reasonableness of rates in all such cases. In the discussion the court say: "It is argued however, and with much force, that there is an existing contract between the borough and the water company fixing the rates to be charged, and that the courts are always open to protect the contractual right of the parties on one side, and to enforce their obligations on the other. This is true, and if there was a valid binding contract in the present case, it would be necessary to sustain the contention of appellants." In our view of the case at bar there has been a valid binding contract in force since January 30, 1911, and it is the contractual rights of the parties that the court is asked to inquire into, to conserve and to adjudicate. The jurisdiction of the Equity Court is therefore not ousted by the act creating the Public Service Commission. As was said by the Court in Bethlehem City Water Company v. Bethlehem Borough, No. 2, 253 Pa. 333, at p. 337, "The Public Service Act of 1913, P. L. 1374. by Article V, Section 29, expressly states, 'Except as herein otherwise provided, nothing in this act contained shall anyway abridge or alter the existing rights of action or remedies in equity or under the common or statutory law of the Commonwealth, it being the intention that the provisions of this act shall be cumulative and in addition to such rights of action and remedies.'"

In view of the conclusions hereinabove disclosed and the authorities cited we see no merit in the defendant's contention that the court has no jurisdiction in the plaintiff's bill. We therefore direct that the case be put on the equity trial list to be disposed of in accordance with law and the prescribed equity rules.

Metzel v. Metzel.

Divorce—Allowance for Counsel Fees.

Where the admitted and controverted facts make it incumbent for the respondent to justify her desertion by proving the facts set forth in her answer, she is entitled to an order compelling the libellant to contribute to the expense of the trial which his action has made incumbent upon the respondent.

Rule to show cause why an order for alimony and counsel fees should not be made.

Walter B. Hays for rule.

J. Edgar Small, contra.

Ruling of the Court.

November 19, 1917. Ross, J.—The admitted facts in this case*, and the facts that have been controverted by the libel and the answer† of the respondent to the libel, are matters that necessarily enlist the careful study of the presiding judge.

The respondent has asked for jury trial after having denied many of the material allegations contained in the libel. We do not think that under the existing state of affairs alimony can be allowed her, but we do conclude, after a careful consideration of the

*The facts agreed are as follows:

1. The respondent is now, and has been for some years past, a milliner by trade, and is at the present time employed as such in the City of York, Pennsylvania, and earns wages of eight dollars per week.

2. The libellant, at the time of instituting the action, was employed by the American Chain Co. in the City of York, Pennsylvania, at an average wage of eleven dollars per week. Since the institution of the action, the libellant has been drafted into the military service of the United States, and in such service will receive the sum of $30.00 per month, he being now in training at Camp Meade, in the State of Maryland.

3. The respondent holds title to three building lots situate in Manchester Township, York County, Pennsylvania, purchased since the marriage of the parties for $24.700, $197.00 thereof having been paid by the libellant.

4. The household furniture of the parties, purchased for about $400.00, was paid for in this proportion: $275.00 by the libellant, and $125.00 by the respondent. In or about the month of November, 1915, the respondent sold a portion of said household furniture and retained the proceeds thereof.

5. The parties have no children, and since November, 1915, the respondent has been supporting herself exclusively by her own earnings, having received no support from the libellant.

†The answer set forth the following facts:

2. The respondent denies that on or about the 3rd day of August, 1915, or at any other time, she deserted the libellant, and she denies that she has absented herself from his habitation contrary to his wishes or without his consent, or without reasonable cause.

3. The repondent avers that from the time of her marriage with the libellant until about April, 1914, the parties lived and co-habited in the City of York, Pennsylvania, but that the respondent, at her husband's request and in order to supplement his earnings, continued to work at her trade of milliner, and in large part supported herself. Since about November, 1912, the libellant has paid the respondent but occasional sums toward her support, never more than ten dollars in any one month.

4. In about the month of April, 1914, the libellant accepted a position in the City of Hagerstown, Maryland; where he then moved, leaving the respondent in the City of York, Pennsylvania, to continue in her own employment. The libellant continued his occasional payments toward the respondent's support and maintained correspondence with her. This separation was in accordance with the express wish of the libellant. In June, 1914, the respondent paid a visit to the libellant at Hagerstown. Some time later the libellant secured employment in Martinsburg, West Virginia, and in August, 1915, the respondent visited the libellant there and pleaded with him to provide a home for them in Martinsburg. The libellant refused, urging that his earnings were not sufficient to make that possible. From then until November 4, 1915, the libellant and the respondent continued to correspond with each other. During this interval, the libellant made but one remittance and that of ten dollars or less, toward the respondent's support.

5. On about November 4, 1915, the respondent received her last letter from the libellant. In that letter the libellant acknowledged that he had been guilty of marital infidelity and remarked that if she, the respondent, knew the truth, she would not care to live with him nor to have her name associated with his. Shortly thereafter, the respondent went to Martinsburg, West Virginia, again to see her husband, but could not find him and learned that he had left there and his whereabouts were unknown.

6. The respondent afterward learned, and here avers, that during the period from August, 1915, to November, 1915, the libellant at divers times had been guilty of adultery with a person or persons to the respondent unknown, and that the libellant on certain occasions introduced the said person as his, the libellant's wife, in order to avoid suspicion and to conceal the identity of his paramour.

7. From November 4, 1915, until now the libellant has contributed nothing toward the support of the respondent; he has at no time offered a home to the respondent; he has never requested her to live with him, nor has he communicated with the respondent either directly or indirectly. In fact, since November, 1915, the respondent has not known the whereabouts of the libellant until recently, when he made his appearance in the city of York, Pennsylvania, and instituted the present action.

whole situation, that the libellant should be ordered to contribute to the expense of the trial which his action has made it incumbent upon the respondent to resort to.

The libellant is ordered to pay to the respondent for counsel fees the sum of $50.00, and for expenses to be incurred by a trial and the subpoenaing of witnesses, &c.,$25.00, within the next ten days.

C. P. of Allegheny Co.

Com. ex rel. v. Pittsburg Bank for Savings.

Receiver—Deposit by Insolvent Company—Note in Bank—Set-off—Receivers' Rights—Debtors and Creditors.

The receivers of a bank have no rights greater than or different from those of the bank itself at the moment of the creation of the receivership, and those were the rights, fixed by law, at the time the depositor became insolvent, so that a deposit in a bank could not be set-off against a note held by the bank, said note not being then due.

It was immaterial whether the bank went into the hands of a receiver before suit entered against the bank. The receivers of the depositor were entitled to dividends awarded other depositors and exceptions to an auditor's report refusing such dividends sustained.

The mutual rights of debtors and creditors of an insolvent corporation become fixed as of the day when receivers were appointed.

The receivers of an insolvent company were entitled to receive a bank deposit as of the time of their appointment and this deposit cannot be set-off against a note not then due. They were bound to pay the note when it becomes due, or such dividend as the assets of the company would afford. The appointment of a receiver for the bank would not change these rights.

Exceptions to Auditor's Report.

Horace W. Davis for petitioner.

October 25, 1917. SHAFER, P. J.—The proceeding is the distribution by an auditor, of the assets of an insolvent bank. The facts are simple and are not in dispute. On July 9, 1913, the Somerset Smokeless Coal Company, being insolvent, was placed in the hands of receivers by the United States District Court. On that day it had on deposit in the Pittsburg Bank for Savings, $11,459.60. At the same time the bank held a note of the Coal Company, not then due, for $19,000.00.

Under these circumstances the rights of the parties at that time according to the rules of law, as correctly stated by the auditor, were that the receivers were entitled to receive from the bank the deposit and bound to pay to the bank the note held by it when it came due, or such dividend as the assets of the Company would afford. This we understood to be conceded by the receivers and the bank. It appears from the report that the receivers of the company demanded the deposit from the bank in August, 1913, and that payment was refused on the claim that the bank had applied the deposit to the note; and that the receivers of the company allowed the matter to stand in that way without bringing suit. The auditor seems to put some stress upon the fact that no suit was brought by the receivers until the failure of the bank, but what importance he attributes to it is not very clear. We are unable to see how delay short of six years on the part of the receivers to sue could affect their rights fixed as of July 9, 1913. But it is contended that the subsequent insolvency of the bank, and appointment of receivers for it, in some way gave the receivers of the bank rights against the receivers of the Coal Company different from what they had at any time before. It is plain, however, that the receivers of the bank have no rights greater than or different from those of the bank itself at the moment of the creation of the receivership, and those were the rights, fixed by law, on July 9, 1913. The fallacy which underlies the auditor's conclusion is that the leaving of matters as they were by the receivers of the company had the same effect as if the Somerset Smokeless Coal Company itself had allowed the deposit to remain in the bank until after the maturity of the note. There can be no question that if the Coal Company, not being in the hands of receivers, had allowed the deposit to remain until maturity of the note the bank would have had the right to apply the deposit to the note; but by the appointment of receivers for the Coal Company the mutual rights of the parties were fixed as of that date, and the receivers of that Company were incapable of changing them, at least by any non feasance.

We are therefore clearly of the opinion that the receivers of the Coal Company are entitled to a dividend with other depositors on their deposit as it stood on July 9, 1913. The exceptions of the Coal Company are sustained and the report is referred back to the auditor to make distribution in accordance with this opinion.

Waltrick's Executor v. Hockensmith.

Pleadings - Certificate of Deposit—Survivorship.

Plaintiff's decedent deposited six hundred dollar payable to the order of himself or another (defendant), and received therefor a certificate of deposit. This certificate contained a proviso that the money belongs to the payees jointly, it being understood that either may withdraw on his or her individual order during their joint lives, and that any balance remaining upon the death of either shall belong to the survivor. After the death of the testator defendant presented the certificate to the bank and drew the entire amount, with interest. Plaintiff brought suit, and the affidavit of defense alleged that the statement did not disclose a sufficient cause of action, averring survivorship and consequent title to the fund in question. HELD, that a motion for judgment for plaintiff must be refused.

The language used in qualifying the general certificate of deposit implies an understanding or agreement between the parties at the time the money was deposited. In the absence of any explanation of this agreement, judgment cannot be entered upon the proceedings.

No. 92 August Term, 1917.

Affidavit of defense raising matters of law to plaintiff's statement of claim.

Motion for judgment for plaintiff.

Cochran, Williams & Kain for motion.

F. M. Bortner, contra.

November 19th, 1917. ROSS, J.—The first paragraph of plaintiff's statements sets forth substantially, that Jerry Waltrick died on the 3rd day of March, 1917, testate; his will was probated on the 14th of March, 1917; the will named as the executors thereof, Elmer Duke, Harry A. Hockensmith and Guy Waltrick. Guy Waltrick renounced his right to act as executor and letters testamentary were duly granted to Elmer Duke, who is the present plaintiff, and Harry A. Hockensmith, who is the present defendant.

The 2nd paragraph recited that "on the 13th day of July, 1916, Jerry Waltrick deposited his own money to the amount of six hundred dollars ($600.00) in the Western National Bank" * * * "in the City of York" * * * "and received from the said Western National Bank a certificate of deposit," as follows:

WESTERN NATIONAL BANK

CERTIFICATE OF DEPOSIT

No. 42191 York, Pa., July 13, 1916.

The amount deposited in this account belongs to the payees jointly, it being understood that either may withdraw on his or her individual order during their joint lives, and that any balance remaining upon the death of either shall belong to the survivor.

Jere Waltrick————————has deposited in this Bank * * * Six Hundred Dollars,————————Dollars, payable to the order of self or Harry Hockensmith on return of this Certificate properly endorsed..... $600.00

100

10.50 CHAS. H. EMIG, for Cashier.

Thirty days notice must be given for the withdrawal of this deposit.

Interest 3 per cent. per annum if left 6 months.

Interest 3 per cent. per annum if left 12 months.

Not subject to check.

[Endorsed] HARRY HOCKENSMITH.

The 3rd paragraph sets forth in substance, that, "After the death of said Jere Waltrick, and before the probate of his will, on or about March 5, 1917, Harry A. Hockensmith, the defendant, presented the said certificate of deposit at the said Western National Bank, and received thereon from said bank, the sum of six hundred dollars, and ten dollars and fifty cents interest thereon, said sum of money being then and there the property of the estate of said Jerry Waltrick, deceased, and not the property of the said Harry A. Hockensmith, and then and thereafter wrongfully and unlawfully converted the said sum of money to the use of him, the said Harry A. Hockensmith."

The affidavit of defense does not specifically deny any of the plaintiff's averments, but claims that it "does not disclose a sufficient cause of action," and does not show "any right of recovery in the plaintiff against the defendant, for the following reasons:

"1. The copy of the certificate of deposit of the Western National Bank of York, Pa., upon which the plaintiff bases his suit, distinctly shows that Jerry Waltrick, now deceased, deposited the sum of $600.00, upon said certificate of deposit, payable to the order of himself or Harry Hockensmith, and by special endorsement thereon provided that either may draw against it during their joint lives and that any balance remaining at the death of either should belong to the survivor.

"2. That the delivery of said certificate by said bank was a delivery to both Jerry Waltrick and Harry A. Hockensmith.

"3. Harry A. Hockensmith having survived Jerry Waltrick became the absolute owner of the fund of which the certificate was the evidence, by operation of the terms of the certificate itself, and under the law was clearly entitled to draw the funds due thereon.

"4. Plaintiff's statement is in other respects uncertain and insufficient and the allegations in the body thereof do not agree with the tenure of the instrument upon which the suit is founded, to wit: Said certificate of deposit, and as a whole, does dot comply with the Acts of Assembly of May 14th, 1915."

The main inquiries here are, does the money in question belong to the estate of the decedent? And did the defendant wrongfully and unlawfully appropriate it to his own use?

The plaintiff in his statement filed specifically charges that the money belongs to the estate. If this charge be sustained by the evidence, it might become necessary for the defendant to show that he did not unlawfully appropriate it to his own use.

The fact that he drew the money from the bank by surrendering the certificate before he was authorized to act as executor, is not explained by the pleadings. He must have had possession of the certificate of deposit at the time he drew the money, but his right of possession depends upon various facts which must be properly shown before an intelligent adjudication can be rendered. From the statement we must conclude that the money was originally deposited by the decedent as "his own moneys," and that he, the decedent, "then and there received from the said ———— bank," the certificate of deposit in question.

The statement specifically shows that, although the certificate of deposit expressly states "that either may withdraw on *his or her individual* order during their joint lives," there had been no withdrawal of any part of the money deposited during the joint lives of the payees.

The language used in qualifying the general certificate of deposit implies an understanding or agreement between the parties at the time the money was deposited. We are not enlightened by the pleadings as to the meaning of the agreement.

If the plaintiff sustains his specific averment that the money in question was the money of the decedent's estate, and that the defendant wrongfully or unlawfully appropriated it to his own personal use, it would, in all probability, become necessary for the defendant to produce evidence as to individual right to the money, and this would probably have to be evidence other than his personal testimony.

It is, therefore, evident that no judgment can now be entered upon the pleadings.

Motion for judgment is refused, and defendant is hereby required to file an additional affidavit of defense within ten days from this date.

Abstracts of Recent Decisions.

Negligence—Seven Year Old Girl—Manhole—Falling Into—Protection From Danger.—Judgment for defendant upon the whole record was refused where plaintiff, aged seven years, fell into the manhole over underground conduits of an electric light company, in that the defendant company could not escape liability by showing that what it did for the protection of the public was that which was commonly done by the city or by other persons opening or obstructing the streets. The question in the end was whether the means employed were under the circumstances reasonably safe, and this was a question for the jury.—*Ceronich v. Duquesne Light Company*, (Allegheny C. P.,) 65 Pittsburg Legal Journal 698.

Depositions—Reading to Witness—Admission.—Plaintiff brought suit for recovery of damages for injuries received by being struck by an automobile, owned and driven by defendant, on August 21, 1916. On October 27, 1916, plaintiff's deposition was taken before a Notary Public, counsel for both plaintiff and defendant being present. Plaintiff died November 4, 1916. At the trial the deposition was offered by counsel for plaintiff and objected to on the single ground that it had not been signed by the witness. The objection was overruled. HELD, on motion for a new trial and judgment *non obstante veredicto*, that the deposition of deceased plaintiff was properly admitted and read in evidence, even though it had not been read to or by him after it was written out and assented to and signed by him.—*Smith v. Michie*, (Montgomery C. P.,) 33 Montgomery Co. Law Rep. 262.

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COMMON PLEAS

C. P. of Lackawanna Co.

Evans v. Scranton Protective Association et al.

Association—Power to Declare Vacancy in Office—Misconduct of Member—By-laws.

Where the by-laws of an association provide that action against any member for conduct detrimental to the purposes of its organization shall be based upon a charge in writing signed by the person or persons making the same, and specifying offense alleged to have been committed, the association has no power, in the absence of such specific charge, to declare a vacancy in an office for the obvious purpose of ousting the incumbent as a penalty for such misconduct.

Demurrer to return to alternative writ of mandamus.

C. B. Little for plaintiff.

P. V. Mattes for defendants.

August 1st, 1917. NEWCOMB, J.—The defendant society and certain of its executive officers are sued jointly. In like manner they join in the return to the alternative writ and no question is raised as to their joint liability, if liable at all. Plaintiff is a member of the association in good standing, and at the time of the grievance complained of was exercising the functions of vice-president by virtue of his election last December for the term of one year. Since May 2, 1917, he has been excluded from the office and he sues to test the legality of the society's proceedings to oust him. From what developed at the argument we ventured to believe that the cause of provocation was rather trivial; that to keep it alive would only tend to impair the usefulness of the association; and therefore we have made an earnest effort to bring about an amicable settlement of the controversy, though without success.

Plaintiff, with one group of members, incurred the displeasure of another group by sending a telegram to members of assembly at Harrisburg, criticising the form and character of a bill pending before the legislature in which the association had taken an active interest. As a measure of punishment the association passed a vote of censure on all who participated in sending the telegram and declared "the office of vice-president vacant for the balance of the term." This, as above noted, was on May 2nd, and after an unsuccessful effort to have the action reconsidered, the plaintiff brought this suit in which he seeks reinstatement.

Defendants justify on no specific authority, either under the constitution or laws of the society; but upon what they regard as general and comprehensive power conferred by Section 1, Article VII, of the by-laws, as follows:

"Should any member of this association violate any of its laws or say or do anything that may be justly construed as injurious, detrimental or hurtful to the purpose for which this association has been organized and incorporated, charges may be preferred against said member or members by any member in good standing. If, after having been notified and given a fair trial, said member or members are found guilty of charges that may have been preferred against him or them, he or they may be dealt with in such manner by this association as may seem best for its purposes."

The power thus conferred is certainly plenary on its face. The penalty of conviction is limited only by the pleasure of the convicting tribunal, and as such gives rise to the objection that it is void for unreasonableness.

The objection is not without merit though the proper disposition of the case makes it unnecessary to decide the point. The answer on the other side is that the administration of the law is subject to the "rule of reason," and that would protect the convict against any unlawful or oppressive penalty.

The weakness of that argument is that it only serves to emphasize the capricious character of the law and thus to reinforce the objection. By what standard shall it be known when the penalty is within the rule of reason? Who is to determine what penalties would conform, and what would be obnoxious to the rule? Penal laws are not to be enforced by such arbitary sanction.

But for present purposes the objection on that ground may be disregarded. The proceeding itself was irregular. Section 2 of the same law requires that "all charges against a member shall be submitted in writing together with the signed name of the person or persons making said charges and *specifying the offense* which has been alleged

to have been committed. The association will then appoint a committee whose duty it is to probe thoroughly into all the details of said charges and report as soon as possible its findings to the association."

The only thing that can be called a charge submitted in writing is a resolution adopted by the association on April 27, purporting to be offered and signed by one W. J. Long. It is as follows:

"There has been brought to the attention of certain members of this association certain facts which have been construed as prejudicial to the interests of the organization and liable to work harm to the best efforts of the organization in its attempt to secure relief from the mine cave menace.

"Therefore, be it resolved, that this organization summon its viee-president, Dr. D. W. Evans, to appear before an investigating committee and make answer to the charges that his actions are detrimental and hurtful to the purpose of this organization, and the said committee be instructed to give the vice-president a fair and impartial hearing and report its findings, together with its recommendation to the organization at the earliest possible moment.

"W. J. LONG."

The following day a copy of the resolution was sent to plaintiff by Lafontaine, the secretary, with request to meet "the investigating committee" at an hour and place designated on April 30th, "to make answer to said charges."

Just what the specific charges were was thus left entirely to conjecture. Whatever they might have been, the resolution would imply that they had been fully "construed" at the outset without waiting the result of trial and investigation. In judicial procedure this would be an anomaly.

Again, the charges—if any there were—could only be tried by a committee appointed by the association. In a case of this kind it is believed the burden of showing the due constitution of the trial court devolves upon defendants, and their averment is only that "a committee was appointed pursuant to a motion or resolution," etc. How the appointment was made is a matter about which the return is silent. The minutes of the proceedings so far as pleaded are equally silent.

But disregarding also this ground of criticism, the important defect remains that the proceeding was founded on no specific charges as required by all analogy as well as the *quasi* statute law of the society itself. The defect was not cured by appearance of the accused and a contest on the merits. The return is at pains to show that he has at all times denied the authority of the association in the premises. and, therefore, the proceeding is still open to objection.

It only remains to be noted that the association has no power to declare any office vacant except to lay ground to elect a new incumbent. But that is nothing to this plaintiff except as it affects him in person by incidentally ousting him, which, no doubt, was the principal object aimed at, rather than a mere collateral incident to the attempted vacation of the office.

On the pleadings the issue is with plaintiff. The demurrer is sustained and judgment directed to be entered for plaintiff with costs.

Harding v. Heindel.

Statement—Tort—Capias to Hold to Bail —Waiver of Defects.

Where plaintiff's statement alleges the receipt of plaintiff's property by defendant in a lawful manner; but further alleges unlawful detention or disposition thereof, a writ of capias ad respondendum in trespass is a proper legal process.

Where, without any objections to the sufficiency or legality of the statement and cause of action, defendant enters bail, it is too late to raise objections subsequently and make them effective to avoid the merits of the cause of action

The allegation that the plaintiff is not the owner of the property alleged to have been detained, but only a bailee thereof, is one of fact which cannot be decided as a question of law.

No. 93, August Term, 1917.

Questions of law raised by an Affidavit of Defense.

V. K. Keesey for plaintiff.

E. D. Bentzel and *C. W. A. Rochow* for defendant.

November 19th, 1917. ROSS, J.—This suit was commenced by issuing a writ of capias ad respondendum in trespass with a demand for bail of two hundred dollars. The necessary affidavit of cause of action was filed and the defendant furnished the bail required by the praecipe and writ. The plaintiff's statement of claim was duly filed and the defendant first comes into court with an affidavit of defense which was filed July 11th, 1917. By the affidavit of defence the defendant raises questions of law

on which he founds a request for "the court to hear and pass upon the same before the trial of the case." They are as follows:

"1. The writ was not the proper legal remedy, but was erroneously and improperly issued. The Act of July 12, 1842, P. L. 339, does not apply to the case as outlined by the plaintiff's statement of claim. *

"2. The plaintiff's statement of claim is insufficient in law to sustain the action based on the preliminary affidavit upon which the writ issued.

"3. The plaintiff is not the owner of the said motor cycle, but only the bailee thereof, and consequently cannot recover either for the value of said motor cycle or for damage for its alleged detention.

"4. The plaintiff's affidavit to hold to bail is defective and insufficient in law to hold the within defendant to bail, because there is no allegation in said affidavit that plaintiff was the owner of said motor cycle. The case should therefore be dismissed with reasonable costs to defendant."

Our answer to the first point is, that we think the writ used for the plaintiff is a proper legal process in a case such as the allegations in the affidavit and statement disclose; Alexander & Co. v. Goldstein, 13 Pa. Superior Ct. 518.

The second and fourth points challenge the sufficiency of the statement and affidavit of cause of action. The statement of claim seems to have been filed and served upon the defendant on the same day the affidavit of cause of action was served; without any objections to the sufficiency or legality, he entered into the required bail. It is too late now to raise those objections and make them effective to avoid the merits of the cause of action. We are of the opinion that the voluntary entering of the bail demanded waives the defendant's right to avail himself of that which might, and should have been, determined by the court before he filed his affidavit of defense.

The third objection raises a question of fact which is beyond the province of the court to decide as the record now exists.

It will therefore be necessary for the case to be tried upon the questions raised by the statement and affidavit of defence or such additional defenses as the defendant shall see proper to file within the next ten days from this date.

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*The plaintiff, Daniel Harding, a minor, suing by his father and next friend, Henry Harding, claims of the defendant, Perry J. M. Heindel, the sum of two hundred dollars on the cause of action whereof the following is a statement:

1. The defendant is alderman in and for the Sixth Ward of the City of York, Pennsylvania.

2. On or about March 3, 1917, the defendant, upon information by a certain Clarence C. Uffleman, issued to Thad S. Stroman, Constable for the Sixth Ward of the City of York, a warrant for the arrest of the plaintiff on a charge of larceny by baillee of a certain 7-H. P. "Indian" motor cycle, and also issued to said constable a search warrant for the seizure of said motor cycle.

3. By virtue of the said writs the defendant was duly arrested by the said constable, and a certain 7-H. P. "Indian" motor cycle of the value of one hundred dollars, then in the plaintiff's possession, was seized by the said constable and taken from the plaintiff's possession and delivered into the custody of the defendant.

4. Subsequently, to wit: On March 24, 1917, the defendant dismissed the said complaint against the plaintiff for want of sufficient evidence, but unlawfully and contrary to his duties in the premises, delivered to the said Clarence C. Uffleman, or to some other person to the plaintiff unknown, the said motor cycle, which had been taken from the plaintiff's possession and delivered into the defendant's custody.

5 On May 11, 1917, the plaintiff served on the defendant notice in writing of his intention to bring this suit upon the cause of action herein set forth unless sufficient amends were tendered to him by the defendant. A copy of the said notice marked "Exhibit A" is hereto attached.

6. No amends have been tendered to the plaintiff by or on behalf of the defendant.

7. Therefore, to recover from the defendant the value of the said motor cycle, to wit: the sum of one hundred dollars, and also punitive or exemplary damages in the further sum of one hundred dollars, the plaintiff brings this action.

C. P. of Allegheny Co.

Berger v. McCluan.

Judgments—Opening—For Materials and Labor—Evidence—Exhibit.

A judgment entered on a judgment note given in payment of a contract for materials and labor in the erection of a house will be opened where the evidence is conflicting and the facts presented are proper for the consideration of a jury.

A copy of a letter was incompetent as evidence where it did not appear that the letter was mailed or how it was brought to the attention of plaintiff, and no demand was first made to have the original produced. Where such an exhibit was a part of a deposition taken on a rule to open a judgment, the court refused to consider it.

Sur rule to open a judgment.

Geo. Y. Meyer for plaintiff.

Joseph P. Weddell for defendant.

HAYMAKER, J., July 18, 1917.—Judgment having been entered on a judgment note the defendant obtained a rule to open. We now have before us the petition of the

defendant, the answer of the plaintiff, and the depositions of the parties and their witnesses. The controversy grew out of a contract in which the plaintiff, H. O. Berger, agreed to do the plumbing work of a dwelling house being erected by the defendant. The plaintiff's place of business was at Homewood in the City of Pittsburgh, and the defendant resided in Bellevue, where the new house was being erected. The contract was oral, whereby the plaintiff agreed to furnish the material and do the work for $455.00, according to the testimony of the defendant, or for $590.00, as claimed by the plaintiff. When the note was made it is conceded that the plumbing work had not been entirely finished, but the extent of the unfinished work is now a matter of controversy, the plaintiff contending that his contract was nearer completion than the defendant is willing to concede. The plaintiff undertakes to justify any delay on his part by setting up the unbusiness-like methods of the carpenter or contractor, while the latter, as well as the defendant, insists that the work of completing the building was delayed by the plaintiff. Thus stood the matter at the time of giving the note. Just before the note was made the defendant negotiated a loan with which to pay the contractor and material men, and it became necessary to secure the release of the plaintiff and others of their right of lien. Up to this time the plaintiff had been paid only $50.00, but he agreed to and did execute the release of liens on payment to him in cash of the further sum of $100.00 and the delivery of the judgment note in question, which is dated March 23, 1917, at thirty days, for $305.00, and was entered of record May 8, 1917.

The real question in the case is this: Was the note given in full satisfaction of the plaintiff's claim for work and materials furnished down to that time, and was the defendant discharged from further liability to complete the job, as he now contends, or was it given, as defendant claims, on condition that the plaintiff was thereafter to complete the job according to his contract, which note, when paid, was to operate as a full payment of the plaintiff's contract price? The question grows out of what actually took place at the time of giving the note, at the defendant's home in Bellevue, on that evening.

There were four persons then present, being the plaintiff, Mr. Morton who accompanied the plaintiff, the defendant and her husband, all of whom appeared as witnesses. The testimony of the defendant and her husband was to the effect that when the note was given on Friday, March 23, 1917, and the release of lien executed, the plaintiff agreed to return not later than the middle of the week following and complete his contract, which he did not do, and she was obliged to have it done by another. The defendant called James J. Coolman, who testified that he, representing the defendant, wrote a letter to the plaintiff requesting him to do the work. That letter was dated March 29, 1917, six days after the execution of the note, and just about the time the plaintiff was to return and complete his contract, according to the evidence of the defendant and her husband. That letter contains the following: * * * "You have been paid in full, partly by cash and partly by a judgment note. We wish to notify you that if the work is not completed at once and the completion started this coming Monday, April 2nd, 1917, another plumbing contractor will be hired, the work completed, and the amount charged up to you."

The letter was offered in evidence, and its admission objected to by the plaintiff. We do not understand this offer. If that letter was properly mailed to the plaintiff, and if it appeared that he made no reply, it would have been of some consequence to the defendant's case; but strange to say there was no attempt to prove that the letter marked Exhibit "A" was a copy of an original mailed to the plaintiff, or that any notice was given him to produce the original. Coolman is simply asked if Exhibit "A" is the paper that he wrote, to which he answered "Yes." If Exhibit "A" is the letter he sent, in what way did it get into the possession of the witness? It it was only a copy why did he not so say and follow up with the proof in the usual and proper way? We will not consider Exhibit "A" as evidence in the case.

The defendant also called Mr. McKissock, a plumber, who testified that it would cost about $300.00 to complete the plumbing work. There is evidence by the defendant's husband that he notified the plaintiff to complete the job. In addition to the evidence of the plaintiff and Morton that the note was given in full settlement to that time, and the plaintiff released from further obligation under his contract, the

plaintiff offers the note in which the defendant agreed to pay that amount in thirty days. He also offered in evidence a memorandum in writing signed by defendant and of even date with the note, which reads as follows: * * * "This is to certify that I still owe him (plaintiff) $300 balance, and he is to surrender a judgment note given to him this day for said amount."

As we have said, the evidence of what took place when the note was given is about equally balanced, and that being the case the defendant has not met the burden resting on her, unless there are corroborating circumstances, or those from which inferences may be drawn in corroboration of her position. To meet the effect of the foregoing memorandum the defendant and her husband testify that the defendant told them that it was a guarantee that he was to return and complete his contract. If the contract price was $455.00 as sworn to by the defendant and her husband, as against the evidence of plaintiff alone that it was $590.00, and if McKissock's estimate of $300 is correct, then it is difficult to understand why the defendant would pay the plaintiff $150.00 in cash and give her note for $305.00, making in all $455, the exact amount of the contract price, and at the same time relieve the defendant from all further liability. While the question is a close one, taking the evidence as a whole, and the surrounding circumstances, we feel that rather than decide these questions of fact it would be better to send the case to a jury.

Therefore, the rule is made absolute.

Ct P. of Potter Co.

Miller v. Satterley.

Justice of the Peace—Practice (C. P.)—Appeals.

An appeal from the judgment of a justice of the peace is not an action "brought in a Court of Common Pleas," within the intent and meaning of Sec. 1, of the "practice act" of 1915, P. L. 483. The procedure therein provided does not apply to such appeals.

Affidavit of defence raising question of law.

No. 7, December Term, 1917.

C. R. Richmond for plaintiff.

V. D. Acker for delendant.

August 13th, 1917. HECK, P. J.—This case comes into court through an appeal from a justice of the peace. Counsel for defendant, under Section 20, of the practice act of 1915, has filed an affidavit of defence raising questions of law which we are now asked to dispose of. Two propositions are presented for our consideration. One is that the plaintiff does not allege a sufficient cause for action. The action is one arising out of contract and statement of claim has been filed under the provisions of the act of June 6, 1879. We have examined the record carefully, and are of the opinion that a good cause of action is set forth, and therefore this exception is not sustained.

The other objection is that no declaration, as provided by the practice act of 1915, has been filed by the plaintiff. This raises the question whether the new practice act applies to appeals to the court of common pleas from judgments of justices of the peace.

Section 1, of the act is as follows: "Be it enacted, etc., that from and after Jan. 1st, 1916, in actions of assumpsit and trespass, except actions for libel and slander, brought in courts of common pleas ,the procedure shall be as herein provided."

It will be noticed that if appeals from the justices of the peace are to be subjected to this act, it must be by virtue of some rules of statutory construction which bring the appeals, when perfected, within the meaning of the words "brought in the court of common pleas." The meaning of the word "brought" when applied to actions, has received definitions from many courts, as will be seen in "Words and Phrases," Vol. I, page 875. We quote a few of these as follows:

"To 'bring an action' has a settled customary legal, as well as general, meaning, and refers to the initiation of legal proceedings in a suit."

"A suit is 'brought' when in law it is commenced, and there is no significanee in the fact that in the legislation of Congress on the subject of limitations the word 'commenced' is sometimes used, and at other times the word 'brought.' In this connection the two words evidently mean the same thing, and are used interchangeably."

The Supreme Court of this state in the case of McLaughlin v. Parker, 3 S. & R. 144, in an opinion by Tilghman, C. J., defines the status of an appeal from a justice of the peace when pending in the court of common pleas. The opinion states:

"As there seems to have been some doubt among the attorneys of the common pleas, it is proper they should understand it to be our opinion, that the appeal is no more than a continuation of the action commenced before the justice; that the same cause of action, and no other, must be prosecuted, on the appeal, and that, in order to support the judgment in the common pleas, the declaration must state a cause of action which accrued prior to the commencement of the suit before the justice."

In the light of this decision and the definitions quoted, we do not see how an appeal from a justice of the peace can be considered as having been commenced or brought in the court of common pleas. Nor do we see any reason for straining the construction of the practice act that its provisions may be extended to appeals from a justice of the peace.

The practice relative to appeals from justices, without scarcely any change, has been undisturbed for over a century. It is simplicity itself. An appeal that finds itself in the court of common pleas is to be tried *de novo*. This is the only provision relative to the manner of its disposition. Any further provisions necessary to its proper disposition are to be made by the several courts of common pleas, each court being at liberty to adopt such rules as will be most effective in determining the prompt and efficient disposition of the appeals.

It has always been the policy of the law to avoid technicalities in practice before justices of the peace, and it seems likewise to have been the policy of the law to have the same practice follow appeals from the justice of the peace into the court of common pleas. Every reason is present for the summary disposition of appeals when in the court of common pleas as existed before the justice of the peace.

The new practice act does not disclose a clear and definite intent that it should be applied to appeals from justices of the peace, and without this, for the reasons given, we hold that appeals are not subject to the new practice act.

Some decisions from the lower courts have been called to our attention in which a different conclusion has been reached. With the greatest respect for the opinion of the judges who have rendered them, we cannot concur in their views.

For the reasons above stated, the questions of the law are ruled against the defendant and in favor of the plaintiff, and the case is ordered placed upon the trial list without reference to the new practice act of 1915.

C. P. of Lancaster Co

Shreiner v. Kauffman.

Replevin—Counter Bond—Lien for Repairs—Automobile—Act of April 19, 1901, Secs. 6 and 7, P. L. 89.

One who exercises his right to a lien on an automobile for repairs and storage, can not give a counter bond and retain possession of the same in case of replevin by the owner. His claim is protected by the bond given by the owner.

Rule to strike off bond of defendant.

B. F. Davis for rule.

Bernard J. Myers, contra.

March 24th, 1917. HASSLER, J.—This writ of replevin was issued by the plaintiff to obtain an automobile in the possession of the defendant. The plaintiff gave a property bond, as required by the Act of Assembly, before the writ was issued. When it was served on the defendant he gave a counter bond, and was permitted by the sheriff to retain possession of the automobile. The plaintiff subsequently, on January 13, 1917, presented a petition to this court, asking us to direct the sheriff to deliver over the automobile to him, upon which this rule was granted. The reason given why this should be done is that the defendant's only claim to the automobile is a lien on it for repairs and storage. The answer concedes the truth of this. The question for our consideration is whether one who has a lien on goods and chattels can retain possession of them by giving a counter bond when the real owner issues a writ of replevin for them.

Replevin lies where one claims title to property, either qualified or absolute, in goods and chattels, with a right of possession when such goods and chattels are in the possession of another. One having a lien on them for repairs has no property, either absolute or qualified, in them. Though he has a lien on them for that purpose, his

right is similar to that of a landlord who has the goods and chattels of his tenant levied upon for rent in arrear. It is well settled that such a landlord cannot give a counter bond and retain possession of the tenant's goods and chattels when the tenant has issued a writ of replevin for them; Pickering v. Yates, 51 Sup. 436. If he does so he is prevented from making a defense on the trial of the case that he levied upon them for rent in arrear; Bair v. Warfel, 5 L. L. R. 81. The reason for this rule is that one having such a lien on personal property is protected by the bond, and must look to that, and not to the goods and chattels for payment of his claim, and being so protected no reason exists why the real owner should be deprived of the possession of them until any dispute as to the lien is finally disposed of. The same reason applies with equal force to one whose lien is for repairs. The bond given by the plaintiff when he issues a writ protects him, and he must look to that for the amount due him. The necessity of retaining possession of them no longer exists, and the owner therefore should not be longer deprived of their possession.

Whatever doubt may have existed on this subject prior to April 19, 1901, has been disposed of by the Act of Assembly of that date, P. L. 89. This Act is entitled "An Act relating to replevin and regulating the practice in cases where writ of replevin is issued," and is intended to govern the whole subject of replevin. No provision is made in it for one claiming a lien on goods, to give a counter bond and retain possession of them. As amended by the Act of March 19, 1903, P. L. 39, it provides that one in possession of goods and chattels may file a counter bond "in the same amount as the original bond, and with like conditions. The condition of the original bond, among other things, is that "if a plaintiff or plaintiffs shall fail to maintain their title to such goods and chattels he or they shall pay, &c." A party has no title to the goods and chattels upon which he has a lien, either qualified or absolute, and therefore can not fulfill the condition of the bond given by him. It follows, therefore, that such a person was not within the contemplation of the Legislature as one who could give a counter bond. The Act, however, does not make provision for those who have liens upon goods and chattels, as it provides in Sec. 6 that one only having a lien on them, shall be protected by a conditional verdict, which the Court shall enforce in accordance with equity principles. Judge Barrett, in Shorley v. Hub Mach. & Ct. Co., 23 D. R. 363, in a well considered opinion abundantly supported by authorities, says, "The meaning of the 6th section is unmistakable. It declares plainly that a lienor is entitled only to equity, and equity is satisfied when the debt which is the foundation of his lien is paid or secured. The conditional verdict provided for is a time-honored mode of administering equitable principles in our Commonwealth. Its effect, therefore, is to establish that the right of the lienor is analogous to the right of the distrainor under the old law. We incline to the opinion that this is merely declaratory of the old law, but if we should err in this regard, and it should be held that, under the law prior to 1901, the lienor had a right to file his claim-property bond, we are clearly of the opinion that the Act of 1901 repeals it, and that under it the lienor has no right to file a claim-property bond. The filing of it is a mere nullity, and the defendant's duty is to surrender the goods under the writ of replevin to the rightful owner thereof, and he must look to the replevin bond as his legal security for the amount claimed by him. There is nothing in the 7th section which modifies this conclusion. Its initial words show that it refers to a proceeding in which the title to the property itself is in dispute, and it is only in such a case that the *retorno habendo* issues; where, as in the case before us, the plaintiff's exclusive title is admitted, there can be no such issue and a verdict would be merely useless. In short, our conclusion is that, in the case of a lien for repairs, the 6th section denies to the tradesman the right to file a claim-property bond, and that the 7th section does not cover such a case, but refers only to cases where the title itself is in dispute. To hold otherwise would enable the tradesman in a case like the present, where no fixed value has been agreed on, to use the claim-property bond as a mere instrument of extortion. The principle underlying the 6th section of the Act of April 19, 1901, P. L. 88, has been long established in England, and in proper cases our own courts have not hesitated to grant specific relief in equity: Morris on Replevin, (ed. 1878), 241."

In Burgert v. Fitch, 32 L. I. R. 420, Judge Edwards decides the same question the same way.

We are convinced that the defendant is not entitled to retain possession of the automobile upon which he alleges he has a claim for repairs, as he is fully protected by the bond given by the plaintiff. No counter bond should therefore have been accepted from him, and it must now be stricken off and the sheriff is directed to deliver the automobile to the plaintiff.

The rule is made absolute.

C. P. of Schuylkill Co.

Leonard v. Atlas Nitrate Products Co., Inc.

Service of Writ—Return of Sheriff—Appearance De Bene Esse.

Rule 4 provides that an appearance de bene esse shall become general unless within ten days after the return of the writ the party entering the appearance shall file exceptions to said writ or to manner of service thereof.

Service of a writ regular on its face cannot be contradicted and set aside merely by the unsupported affidavit of the party upon whom the service was made.

A. D. Knittle for plaintiff.

John F. Whalen for dependant.

April 23, 1917. BECHTEL, P. J.—This case comes before us on a rule to set aside the service of the writ and plaintiff's declaration. The return of service is as follows: Served the within writ on the Atlas Nitrated Products Company, Inc., by handing to Allen Krappa, agent of said Company, a true and attested copy of said writ, at the office of said Company in North Manheim township and make known to him the contents thereof on October 18th, 1916, it having first been ascertained by inquiry that none of the executive officers of said company resided in Schuylkill county. So answers Charles F. Ditchey, sheriff.

On the 10th of November, 1916, the defendant entered appearance as follows; John F. Whalen, Esq., d. b. e. On the 16th of January, 1917, defendant filed the affidavit of Allen Krapf, which set forth that he was the person upon whom the sheriff served the writ and that his name was Krapf and not Krapa, and denying that he was at the time of the service of the writ the agent of the Atlas Nitrated Products Company, Inc., or prior thereto or since that time and denying that the sheriff made any inquiry as to whether the executive officers or either of them resided in Schuylkill county. On this affidavit the rule in this case was granted. There has been no testimony taken in support of a rule. Counsel for the plaintiff invokes rule four of the "Rules of Court of Schuylkill county," which is as follows: "An appearacce de bene esse shall become general unless, within ten days after the return of the writ the party entering the appearance shall file exception to said writ or to the manner of service thereof." It will be noted that this rule was taken considerably more than ten days after the appearance was entered, but we are unable to ascertain from the record when the return of service of the sheriff was made. We are unable to determine, therefore, whether or not this rule was taken within ten days from the time of the return of the writ.

It was noted, however, that no formal exceptions have been filed to the sheriff's return at all. Nothing has been done save the filing of the affidavit aforesaid, and the issuing of the rule. We do not think that this complies with the Rules of Court as hereinbefore set forth. In addition to this, we do not think that a service regular on its face can be contradicted and set aside merely by the unsupported affidavit of the party upon whom the service was made. The sheriff's return is sworn to and should have at least equal weight with the affidavit of the party upon whom he makes the service.

The rule to show cause why the service of the writ of the plaintiff's declaration should not be set aside is herewith discharged at the costs of the defendant.

Act of April 20, 1905, P. L. 239—Judgment upon the whole record—Priority of mortgage over lease.—The answer under the Act of April 20, 1905, P. L. 239, must aver that there are material facts in dispute, and must aver the nature and character of the facts, and where it sets forth information received, the sources should be given, and should contain an averment of ability to prove the same. Where the facts admitted show a mortgage on record prior to the lease of the tenant in possession, the tenant is not in a position to defend on the ground of want of consideration for the mortgage.—*Horvath v. Rull*, (Northampton C. P.) 16 Northampton Co. Reporter 115.

C. P. of Montgomery Co.

Yost v. Hamilton Apartment Co.

Plaintiff occupied a suite under a monthly lease from her landlord, directly below a suite with kitchenette, occupied by another party, and brought suit against defendant to recover damages done by water trickling down from said suite above her, into her clothes' closet. The ground of recovery, as set forth in the statement, being the alleged negligence of the defendant landlord, the trial judge, holding that the relation of landlord and tenant having existed, entered a compulsory non-suit, which it subsequently refused to remove.

As regards the liability of landlords to third persons, the tenant and not the landlord is liable to third persons for accidents and injury occasioned to them by the premises being in dangerous condition.

Motion to take off non-suit.

Irvin P. Knipe for plaintiff.

Samuel H. High for defendant.

July 13, 1917. MILLER, J.—The amount of money involved in this case is so small that the notes of testimony taken at its trial have not been transcribed.

The trial judge did, however, keep rather elaborate trial notes and from them, and because of the novelty and interesting character of the question in controversy, it is desirable, especially in case of review, that the material facts of the case should be stated in some detail.

They are, of course, not in dispute.

The defendant has conducted a large apartment house in the Borough of Norristown, since the year 1913. F. M. Scheibley is its manager. On the fourth, or topmost, floor, are two suites of, so-called, house-keeping apartments the tenants of which do their own cooking and housekeeping. One, Miller, and his family occupies one of these suites under a lease for a term which commenced on May 1, 1914. There is included in this suite of rooms a kitchenette, which contains a refrigerator, that was owned and provided for the tenant's use by the defendant as part of the equipment of the apartments.

On third floor of the house, directly below the Miller suite, is a single apartment with clothes-closet and bath-room attached. This has been occupied by the plaintiff "as her home," under a monthly lease, for the last seven or eight years. Unlike the occupants of the two suites of house keeping apartments above, she, when at home, does no cooking, but eats in a dining-room maintained by the management, which also provides her with chambermaid service. In other words, it has access to, and the care of, her room, from which she is frequently absent for extended periods, but it does not have access at any time to the closet attached to that room in which she keeps much of her wearing apparel, books and other possessions.

The kitchnette above is directly over this closet.

Late in the fall of 1914, Miss Yost was absent for about a week. Before going away she locked her closet and took its key with her. Several days after her return she discovered that the contents of the closet had been considerably damaged by water from the kitchenette above.

It was shown at the trial that the refrigerator in the kitchenette had been so placed that the drippings from the drain pipe in its bottom dropped into the open or larger end of a funnel which had been loosely set, directly below it, into the upper end of an open, vertical and stationary drain pipe which, leading through the floor and a trap, finally reached the street sewer. The upper rim of the funnel was about 4 inches above the floor level and six inches below the bottom of the refrigerator and, as stated, the joint between the funnel and the pipe into which it was set was an open one.

Mr. Evans, an expert plumber of 13 years experience, who was sent for by Mr. Scheibley, promptly after the latter learned of the accident, testified that "there was nothing defective about the pipes;" "they were in first-class condition, so far as I could see;" "this system was the one in common use. It can be done in no other way;" "this was the system required by the Board of Health;" "I know of no better method than that used;" and, "I never saw a drip pan used in this connection."

When Mr. Evans made his examination he found the permanent waste pipe, between the funnel at its mouth and the trap, directly under the floor below, "stopped up with slime made by ice water." He said, "If such pipes are not cared for by those who use them, they clog up soon. Hot water should be poured down them every two weeks." "This is all that is required to be done to keep the pipes open."

This clogged condition caused the water in the permanent drain to back up and pass out between its upper end and the funnel, which joint was so close to the floor that the leak was scarcely perceptible. There was no evidence of the over-flow on the kitchenette floor.

The escaping water then trickled down along the outer surface of the pipe through the opening in the wooden floor, only the edges of which were made moist thereby, until it reached an angle in the pipe, over the ceiling of Miss Yost's closet, where it dropped and did the damage of which she complained.

As stated, the defendant did not have access to the locked closet. When the plaintiff returned there was no water on the floor of her room outside the closet door and it was not until 3 or 4 days afterwards that she first discovered the injury done her. She knew that the kitchenette and drain pipe were over the closet.

Mr. Scheibley, a hotel man of about 20 years' experience, had never before had a similar experiene and did not know of the clogged condition of the pipe until the accident had occurred, but did know that "waste pipes under refrigerators would clog —as a general proposition."

There was no testimony, whatever, to show that during the six or more months preceding the accident, during which time the apartments above had been occupied by the same tenants, the drain had ever overflowed; when it had last been cleaned out, or flushed with scalding water, if such had been done at all; when, it had been ever, or last, inspected by the defendant; that the plumbing above was not in safe condition when possession of the house-keeping apartments was delivered to Miller, the tenant thereof; that the defendant, thereafter, exercised any control or supervision over that plumbing; that the defendant, for any purpose, had access to the Miller apartments; or the terms of the defendant's contracts with either the plaintiff or the tenant above.

The ground of recovery, as set forth in the statement, being the alleged negligence of the defendant, the trial judge, under the above facts, entered a compulsory non-suit which we are now moved to take off.

More mature reflection than was possible at the trial now but confirms our opinion that the plaintiff is not entitled to recover.

We are aware that if there was any evidence which alone would justify an inference of the disputed facts on which the plaintiff's right to recover depended it should have been, according to well settled rule, submitted to the jury. The plaintiff is entitled to the benefit of every inference of fact which might have been fairly drawn by the jury from the evidence before them: Bellman, appellant v. P. & A. Valley Ry. Co., 31 Pa. Supt. Ct. 389 and cases cited; but negligence, to be actionable, must be at least the breach of a legal duty: Phillip v. Craft, 139 Pa. 125; i. e., a breach of duty owed to the plaintiff; Fleming v. Phila. Co., appellant 234 Pa. 74, 77; Dialesantro v. Phila. Co., appellant, 47 Pa. Sup. Ct. 339, 341.

It seems, therefore, that the first thing to determine, in a proper disposition of the motion now before us, is the relationship that existed between the parties under the disputed facts.

Was such relationship that of inn-keeper and guest, boarding-house-keeper and boarder, or landlord and tenant?

A guest is a traveler or transient comer who puts up at an inn for a lawful purpose to receive its customary lodging and entertainment: DeLapp v. Van Closter, 118 S. W. 120; 2 Words & Phrases 809; 2 Bouvier's Law Dict. 1397. "The lexicographers define the word 'guest,' when used in the sense to which we are now referring, as a lodger or boarder at a hotel, lodging house, or boarding house;" Hirsh v. Anderson Hotel Co., appellant, 58 Pa. Sup. Ct. 387, 395.

A "boarder" is one who makes a special contract with another person for food, with or without lodging: Berkshire Woolen Co. v. Proctor, 7 Cush. (Mass.) 424; 1 Bouvier's Law Dict. 373; 3 Corpus Juris 1131, 1132; Lawrence v. Howard, 1 Utah 142; and is to be distinguished from the guest of an inn-keeper: ibid. See, generally, 14 L. R. A. (N. S.) 476.

The testimony does not show whether the monthly rental of $20, which the plaintiff said she paid for her "room," did or did not include her table-board when she was at home. It does, however, clearly indicate that she "rented her apartment on one room and a bath for $20 a month" and that she had occupied it for 7 or 8 years as her "home."

The defendant had no access whetever, at any time, to the closet and could only enter the remainder of her apartment for the purpose of keeping it in order. The

house itself was an "apartment house," containing at least two house-keeping apartments which were rented to other tenants.

We therefore concluded at the trial, and are still of the same opinion that, under these facts, the relation of landlord and tenant, and not that of either inn-keeper and guest or boarding-house-keeper and boarder, existed between the parties at the time of the injury complained of, as it did between the defendant and Miller, the upper tenant.

The terms of the contract being fixed, their legal import was for the Court to declare: Bowman v. Bradley, appellant, 151 Pa. 351, 359.

If our conclusion was, and is, correct then it follows that the defendant is not liable for Miller's negligence, if there were any such.

As regards the liability of landlords to third persons, it may be stated as a general rule that the tenant and not the landlord is liable to third persons for accidents and injury occasioned to them by the premises being in dangerous condition and the only exceptions to this rule appears to arise where the landlord has either (1) contracted with the tenant to repair, or (2) when he has let the premises in a ruinous condition, or (3) when he has expressly requested the tenant to do things amounting to a nuisance: Cunningham v. Rodgers, 225 Pa. 132; Levick, appellant v. J. A. Patterson Co., 65 Pa. Sup. Ct. 261.

There appears to be no reported Pennsylvania case similar in its facts to that before us. The subject is treated at some length, however, in a note to be found in 12 L. R. A. (N. S.) 1025. There is to be found commented upon the leading case of Leonard v. Gunther, 62 N. Y. supp. 99, which was mentioned by the trial judge when the non-suit was entered, that it is now sought to have taken off, and which decided that: "If the dangerous condition is created by the tenant in occupation by misfeasance or non-feasance, or a fixture not dangerous per se is, by the act of omission of the tenant, turned into a nuisance on the premises demised, the landlord is not liable for damages resulting. The injury in such case has for its proximate cause the failure of duty on the part of the tenant; it is his misfeasance or non-feasance, and not that of the landlord."

See, also, Becker v. Bullowa, 73 N. Y. supp. 944.

Assuming, however, for the sake of argument, that under the facts as shown, the relation of boarding-house-keeper and boarder existed and the defendant owed the plaintiff the legal duty of exercising ordinary care, what negligent act, on its part, of either omission or commission, was shown by, or may fairly be inferred from, the testimony? Negligence, like any other fact, must be proved and is not to be presumed. Mr. Scheibley, it is true, knew, as should every one, that waste pipes under refrigerators would, as a general proposition, clog. But the Millers had used this pipe for over six months. It had never caused trouble before. It was not shown when it had been last inspected or cleaned out. Such might have been done so recently as the day before the accident. The defendant had the right to assume that the Millers would make proper use of the appliances furnished them. They were in good condition when furnished and continued in that condition down to the time of the accident.

To fasten responsibility upon the defendant, under the facts of this case, would make the ownership of office buildings, apartment houses, tenement-houses, and other structures, which are necessarily occupied by two or more separate tenants, a very hazardous undertaking.

Such owners should not be required, and under the law, as we understand it, are not required to insure their tenants against the negligent acts of their co-tenants. Certainly not against any such that are not fairly and reasonably to be anticipated, or of which they have had no notice.

We, therefore, conclude that, if the relationship existing at the time of the accident between the parties was that of landlord and tenant, as we find to have been the case, then, under the facts, the defendant owed no legal duty in the premises to the plaintiff and, should that relationship have been that of boarding-house keeper and boarder in which contingency the rule of ordinary care would have applied, neither the facts nor the inferences which could properly and fairly have been drawn from those facts, showed any negligence on the part of the defendant.

In the cases of Killion v. Power, 51 Pa. 429 and Levinson v. Myers, 24 Pa. Sup. Ct. 481, the defendant landlords were in possession of and control over the upper apartments. Under our facts they can have no application.

The motion to take off the non-suit is over-ruled.

C. P. of Schuylkill Co.

Moskovitz v. Katsuch.

Judgment by Confession—Opening—Agency.

Where the defendant can neither read nor write and signed a judgment exemption aote upon the representation that it was to secure a smaller sum than the face of the note the court will permit him to show such imposition.

A person cannot represent both parties to a transaction without the knowledge of such fact by both parties and if such agent deceives either of the parties he cannot recover commissions from either.

Rule to open Judgment.

R. A. Freiler for rule.

J. H. Rothstein, contra.

November 5, 1917. KOCH, J.—Judgment was entered for the sum of one thousand ($1000.00) dollars in the above case upon a bill single dated the 17th day of October, 1916, waiving inquisition and exemption. A writ of fieri facias having been issued to collect the sum of nine hundred and fifty (950.00) dollars, the defendant filed his petition to have the said judgment opened, and, the rule having been granted, testimony was taken for both parties to the action. Since the testimony was taken, the defendant has filed a supplementary petition to open the judgment. The later petition, in its statement of facts, conforms more nearly than the first with the evidence taken in support of the rule to open the judgment. The plaintiff lives in Wilkes-Barre, and the defendant in Lansford, Carbon County. Plaintiff is a wholesale liquor dealer and defendant conducts a saloon. They have known each other for about ten years.

According to the testimony which was submitted in this case, it appears that the note in question was made under the following circumstances:

Aaron Moskovitz, a brother of the plaintiff, on the 20th day of September, 1916, entered into an agreement with Peter Sofsky, of the Borough of Lansford, to procure a customer for the purchase of the latter's saloon business, on a commission basis of 10 per cent.

Aaron Moskovitz testified that he obtained the agreement for his brother, Morris. Aaron met the defendant in Pottsville and they together went to Lansford to look at the property. Several days later, the two Moskovitz's and the defendant went to Lansford and the terms of the sale were agreed upon at $8000. Sofsky's attorney, W. G. Thomas, Esq., of Lansford, drew up the agreement between the parties. Fifty dollars had been paid down in the beginning and later $1000. When the license was transferred, the defendant paid to Sofsky $6000 more and Morris Moskovitz paid to Sofsky $150.00 for Katzuch, thus making the sum of $7200 paid to Sofsky. Morris Moskovitz had prepared the note in question and got the defendant to sign it. The amount of the note was intended to cover the eight hundred dollars commission which Moskovitz was to receive from Sofsky and the one hundred and fifty dollars which Moskovitz paid to Sofsky as already stated. The mistake in making the note $1000.00 was discovered before execution was issued in this case, and consequently execution was issued for $950.00, instead of $1000.00, or the face of the note.

The defendant can neither read nor write. When the writ of fi. fa. was served upon him, he filed his petition for this rule averring that the note for $1000.00 had been fraudulently obtained. He did not deny the signature on the note, but averred that it was to secure the sum of $150.00 and not $1000.00, and that he had been fraudulently induced to put his mark to the note for $1000.00. When the testimony was taken, the defendant claimed that he had been induced by Morris Moskovitz to buy this place; that Morris Moskovitz told him that he did not want to make anything out of it himself but that he wanted the defendant to continue as one of his customers when he acquired the saloon. The defendant claimed that the plaintiff acted as his agent in the purchase of this saloon. There can be no doubt about the plaintiff acting as the agent for Sofsky and that he and his brother got Katzuch to buy the place. He admits that he was acting for both. He corresponded with Sofsky and on the 27th of September, 1916, received a letter from him to bring the party to Lansford.

The following appears from the testimony of Morris Moskovitz:

"Q. You were acting for Mr. Katzuch then in the matter?

A. Well; I was acting for both of them.

Q. You were acting for both of them?

A. I was acting for Mr. Katzuch and Mr. Sofsky both."

Aaron Moskovitz also testified that Morris was acting for both.

The following appears from his testimony:

"Q. For whom were you acting?

A. Morris Moskovitz.

Q. Who was Morris Moskovitz acting for in the transfer?

A. For both. We drew both parties together.

Q. Did either you or Morris in your presence, at any time, make known to Katzuch that he was receiving this sum of $800 commission.

A. No."

W. G. Thomas, Esq., testified that Morris Moskovitz was acting for Katzuch when in his office.

The second petition which was filed is based upon the dual capacity in which the plaintiff acted. The defendant contends that in as much as Moskovitz could not, in an action at law, collect from Sofsky the commission agreed upon, Moskovitz cannot collect from him, the defendant, the amount of the commission which is included in the said judgment note.

He cannot serve two masters. He cannot be the agent of the seller and at the same time the agent of the buyer. This is against public policy and is not contenanced in the law, except in cases where the dual attitude of the agent is clearly and fully known to both the seller and the buyer and both consent thereto, and where the agent acts for both, without the knowledge of such fact by both, he is not entitled to recover compensation from either; Wilkinson v. McCollough, 169 Pa. 205; Addison v. Wanamaker, 185 Pa. 536; Cannell v. Smith, 142 Pa. 24; Rice v. Smith, 136 Pa. 439; Railroad Company v. Flannigan, 112 Pa. 558; Everhart v. Searle, 71 Pa. 256; Mitchell v. Schreiner, 43 Superior Court 633; Eightcap v. Nicola, 34 Superior Court 189; Marshall v. Reed, 32 Superior Court 60; Evans v. Rockett, 32 Superior Court 365; Fulton v. Walters, 28 Superior Court 269; Linderman v. McKenna, 20 Superior Court 409.

The plaintiff could not recover from Sofsky were he to sue him for the commission of $800.00 nor should he be permitted to take advantage of his own wrong and recover the amount from the defendant in this case.

The rule is made absolute and the judgment is opened to permit the defendant to defend.

C. P of Northampton Co.

Macan v. Scandinavia Belting Co.

Foreign Attachment—Motion to Quash—Reduction of Bail.

In jurisdictions where appearances *de bene esse* are abolished by rule of court, the defendant cannot, without a general appearance, be heard to object to the cause of action stated; but may appear specially to challenge a jurisdictional fact, by deposition or proof *dehors* the record.

Bail demanded by the plaintiff in foreign attachment will not be reduced upon a motion to quash. That question can only be considered upon a rule to show cause why bail should not be reduced.

Motion to quash writ of foreign attachment.

Motion denied.

Aaron Goldsmith and *W. S. Kirkpatrick* for plaintiff.

F. W. Edgar and *R. A. Stotz* for the defendant.

June 25, 1917. STEWART, P. J.—On the 24th day of May last, Geo. C. Macan, Jr., issued a writ of foreign attachment against the Scandinavia Belting Company, based upon a contract in writing, attached to his affidavit, and alleging a breach thereof, and claiming damages therefor, and summoning the Macan Jr. Company as garnishee. On the 11th day of June, 1917, "the Scandinavia Belting Company, defendant named, by Robert A. Stotz and F. W. Edgar, its attorneys, without causing its appearance to be entered, moves the court to dissolve the attachment for the following reasons, viz:" Then follow six reasons to the effect that the statement and affidavit do not disclose a good cause of action; that the contract does not disclose any criterion by which the damages may be estimated; that the damages are so speculative in character that they cannot be determined; that it appeared that the said George C. Macan, Jr. had presented a petition to stay two executions issued by the Scandinavia Company against the Macan Company; and that George C. Macan, Jr., was really the same as the Macan Jr. Company; and that this attachment was not issued for the benefit of the plaintiff, but for the benefit of the garnishee; that George C. Macan, Jr., is stopped by the pleadings and testimony which he gave in two suits brought by the Scandinavia Company against the Macan Company, wherein the Mecan Company had set up as a defense the breach of the same contract as that in suit; and that the verdicts

in those cases were in favor of the Scandinavia Company; and that the said Macan, Jr., had caused these attachments to be issued for the mere purpose of delaying the payment of the above judgments. We have examined the affidavit and statement, and no objection can be taken to them. It was decided by Judge Elkin in Commonwealth to use v. Baxter & Co., 235 Pa. St. 179, that a foreign attachment would lie in a case like the present. An obliging legislature, by the Act of June 21, 1911, P. L. 1097, affirmed that decision. The contract in suit is very familiar to us. In our charge to the jury in the two cases, Nos. 86 and 87 January Term, 1916, which cases were affirmed by the Supreme Court, although at this writing we do not know whether what we said on the subject of damages was assigned for error or not, we said: "Now, they claim profits. Profits are not to be excluded in your consideration of this case simply because they are profits. There is no rule of law that there is any such requirement at that. They are not to be considered if they are speculative. They are not to be considered unless you believe that these profits were necessarily in the contemplation of the parties, and unless you believe that these profits would have been reasonably made if the contract had not been terminated, and you must consider them as of the time when the contract was broken." (Page 35). Then on the following pages we explained more fully the subject. Parenthetically we may say that having this in mind, we suggested after the argument, to the learned counsel for the plaintiff in the attachment, that in our judgment the bail demanded was too high and should be reduecd in accordance with the request made by the learned counsel for the defendant upon the argument, but counsel for the plaintiff insisted that it was irregular, to do it upon consideration of the present motion. That position is correct, but in view of our knowledge of this case, we should confine the taking of any testimony, or any argument to the narrowest limits if an application was made to reduce the bail. Although the learned counsel for the defendant have cited Sales Service Co. of Pa. v. Mutual Orange Distributors, 63 Pittsburgh Leg. Journa 719, we cannot make the order that they ask for as the matter is not properly before us. The matters set forth in the other reasons cannot be considered from any point of view. The record shows that George C. Macan, Jr., is the plaintiff. We cannot consider the case as if he was identical with the Macan Jr. Company, nor can we look into the pleadings or the record of the other cases, or to the motives with which this case was commenced. The only relation those cases have to the present case is in just such matters as referred to above in the reduction of bail, which depend on our discretion. This motion must be dismissed because the reasons do not set up such matters as can properly be considered by the court. Our learned predecessor, President Judge Scott, in Clement & Co. v. Didier March Co., 13 Northampton Co. Rep. 293, has so well stated the rule that no further citations are necessary. The syllabus of that case is: "In jurisdictions where appearances *de bene esse* are abolished by rule of court, the defendant cannot, without a general appearance, be heard to object to the cause of action stated, which is the appropriate subject of demurrer; but may appear specially to challenge a jurisdictional fact, by deposition or proof *dehors* the record." That case was affirmed by the Supreme Court, and the ruling made above was not questioned: 244 Pa. St. 616. Counter affidavits tending to set up a defense to the action, are never to be read or considered. As President Judge Johnson of Delaware County, said in Gray, Assignee v. Hanf Optical Co., 8 Delaware Co. Rep. 255: "If the writ is regular and the defendant a non-resident, and not within the county when issued, if he acts at all, he has one of two courses to pursue. He may enter bail and have the attachment dissolved, or he may enter an appearance and make defense without entering bail, in which case the attachment will continue."

Motion of the defendant to dissolve attachment is denied.

C. P. of Luzerne Co.

Confer v. Smith.

Pleading and Practice—Affidavit of Defense—Form of—Act of May 14, 1915, P. L. 483.

A statement that is not divided into paragraphs, as required by the Act of May 14, 1915, P. L. 483, will be stricken from the record in that it does not comply with the Practice Act.

Motion to strike off pleading.

Abner Smith for plaintiff.

A. H. Jones for defendant.

GARMAN, J.—The plaintiff brought suit against the defendant before Thomas A. Buckley, Justice of the Peace. As stated in the transcript the claim was "for the sum of $30; being a balance due on an agreement entered into March 20, 1915, whereby the defendant agreed to pay the sum of $5 per month to the plaintiff for a right of way over the land of the plaintiff until such time as all the marketable timber shall be cut and hauled away." The judgment of the Justice of the Peace was appealed from by the defendant and the transcript of appeal filed to the above number and term.

The plaintiff then filed a statement and the defendant moved to strike off the pleading, setting forth to sustain his motion, among others, the following specification:

2. The plaintiff's statement is not divided into paragraphs numbered consecutively as required by law.

This exception is sustained; the others are dismissed. The statement filed is stricken from the record.

The plaintiff is permitted to file within thirty days a new statement complying with the Act of Assembly of May 14, 1915, P. L. 483.

ORPHANS' COURT

O. C. of Allegheny Co.

Daerr's Estate.

Practice, O. C.—Failure to Advertise Notice of Letters Testamentary—Suspension of Distribution until Publication.

Notice by publication of the grant of letters testamentary to an executor not having been given as required by law, the court ordered that distribution be suspended, notice of the letters be immediately published and the account be republished at the expiration of one year from the first publication of the letters, unless the distributees should give refunding bonds.

Suspension of distribution until publication.

William M. Ewing for Accountant.

Scott & Purdy for Exceptant.

November 2, 1916. PER CURIAM.—It appearing to the court that notice by publication of the letters issued to the executor was not given as required by law, it is ordered that distribution be suspended, that notice of the letters be immediately published, that the account be republished at the expiration of one year from the first publication of the letters, unless distributees will give refunding bonds.

O. C. of Lancaster Co.

Hahn Estate.

Life Estate with Power to Sell—Note for Money Borrowed.

Where a decedent left by his will all of his property to his widow for life with power to use the principal, or sell or encumber the real estate if necessary for her maintenance, a promissory note given by her for money borrowed will not be paid out of his estate after her death.

Adjudication.

Coyle & Keller for accountant.

D. McMullen for claimant.

June 14, 1917. SMITH, P. J.—Philip Hahn died testate January 14, 1894. The important paragraph of his will is as follows:

"Item. I give, devise and bequeath to my wife, Sabena Hahn, all my estate, real, personal and mixed, for and during the term of her natural life, or so long as she remains my widow, with full power and authority, however, to use, during her widowhood, not only the income thereof but also of the principal, and to sell any or all of my real estate, either at public or private sale, or borrow money thereon by mortgages or judgments, in case she finds it necessary to so use of the principal of my estate, sell or incumber my real estate in order to maintain herself comfortably; of which necessity she alone shall be the judge."

"Whatever may be left" after the death of testator's widow he gave to his children, Philip, Peter, George, Wilhelm, Mary and Annie. George died in 1910, before the widow, leaving a widow, Emma P. Hahn, and two children Edith and John. The fund distributing is the proceeds of sale of real estate. Whether or not the widow found it necessary to use of the principal and to do so sold real estate does not appear, nor is there any evidence that she encumbered the real estate; therefore, the balance after deducting additional credits amounting to $37.65 is distributable amongst testator's living children and George's children. As there was no seisin in George during coverture his widow can not participate.

Cyrus Hollinger asks to be awarded $635.66 for money lent Sabena Hahn, of

which $609.01 is evidenced by notes given by her. The proofs clearly establish her indebtedness, but no reason has been advonced why it should be paid out of the testator's estate. If it had been necessary for her to draw on the corpus ot the life estate for her comfortable support, she had the power to encumber the real estate which she did not do. An ordinary debt contracted by her or a note given did not encumber the testator's real estate. If it had been the intention so to do, it would have been easily accomplished by her executing a mortgage or a judgment. No doubt the claim is a just one and there is nothing to prevent Hollinger from presenting it for payment out of the estate of Sabena Hahn, deceased.

Mary Hahn, a daughter, asks to be paid $324.00 for nursing and serving her mother but she was unable to prove that there had been a contract, and, therefore, the claim will not be entertained.

Distribution was made accordingly.

O. C. of Allegheny Co.

Dailey's Estate.

Guardian — Minor's Estates — Legacies — Mother—Act of June 7, 1917, P.L. 447.

The Fiducinries Act of June 7, 1917, P. L. 447, vests the Orphans' Court with a new discretion in minors' estates, so that where the legacy of four minor children amounted to $50 each, the court direct that these legacies be paid direct to the mother without the appointment of a guardian.

Sur audit.

Langfitt & McIntosh for accountant.

September 28, 1917. MILLER, J.—Testator gave to each of his children a legacy of fifty dollars; four of them are under age. Their mother, who is the residuary legatee and administratrix, has placed their shares in bank to their credit. The children are living with her and so far as the record goes she is providing for them. No guardian has been appointed.

Sub-division b, section 59, of the Fiduciaries Act of June 7, 1917, P. L. 447, provides: "That where an estate of a minor shall be of the value of one hundred dollars or less, the court may in its discretion authorize payment or delivery thereof to the natural guardian of the minor or the person by whom the minor is maintained, without the appointment of a guardian by the court or the entry of security."

The foregoing is a new provision and vests the court with a discretion in minors' estates of this amount. In view of the fact that the mother in this case, who is the natural guardian, is keeping her children together and is maintaining them and seems to be an entirely fit person, it is a proper exercise of the discretion conferred to direct the legacies to be paid to her, the same to be expended by her for the benefit of the minors as in her judgment may seem to their best interests.

QUARTER SESSIONS

Com. v. Degen.

Summary Conviction—Sunday Sales—Cigars and Tobacco.

On an appeal from a summary conviction for violation of the Act of April 22, 1794, 3 Sm. Laws 177, where the record shows no fatal defect of procedure, and the sale of cigars on Sunday clearly proven, the judgment of the Alderman must be affirmed.

Appeal from summary conviction.

R. P. Sherwood for appellant.

J. Edgar Small for appellee.

December 17, 1917. WANNER, P. J.—This was a conviction of the defendant under the Act of April 22nd, 1794, 3 Smith Laws 177, which forbids all wordly employment on the Sabbath day except only certain works of necessity therein specified, which may be performed within certain hours of said day. It is conceded by defendant's counsel that said Act is in full force and effect in this commonwealth, and that the record of this case discloses no fatal error of procedure therein. The only remaining question, therefore, seems to be whether or not the sale of tobacco, cigars and candy were works of necessity or charity, or otherwise, within the exceptions specified in the Act.

It has repeatedly been held that sales of tobacco and cigars on Sunday are a violation of the statute in question; Com. v. Hoover, 25 Pa. Super. Ct. 133; Com. v. Moses, 8 York Leg. Rec. 60: Baker v. Com., 5 Pa. C. C. R. 10.

It is unnecessary, therefore, to determine whether or not the sale of candy was also a violation of the statute, as the sale of the cigars is sufficient to sustain the conviction.

The judgment of the Alderman is affirmed, and the costs of the appeal directed to be paid by the defendant.

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COMMON PLEAS

Sturtevant Company v. York Card and Paper Company.

Practice Act of 1915 – Affidavit of Defense —Counter Claim—Consequential Damages.

The affidavit of defense to a suit to recover balance due on a contract set forth a counter claim for damages resulting from a stoppage of defendant's mill in order to repair constructive defects in plaintiff's work. Plaintiff moved for judgment for want of a sufficient affidavit of defence. HELD, that the motion must be refused.

Under the Practice Act of 1915, a counter claim in the affidavit of defense must be met by an answer, raising either a question of law or of fact.

A motion for judgmrnt for want of a sufficient affidavit of defense cannot be used as a substitute for an answer.

When the statement, affidavit of defense, or any other pleading is formaliy defective and not in conformity with the provisions of the Practice Act of 1915, the Court should be moved to strike it off.

The contract in suit contained a clause providing that plaintiff shall not be held liable "in any event for any special, indirect or consequential damages whatsoever." HELD, that such clause would not relieve from liability for loss by reason of wages of idle employees, and similar expenses, during the necessary stoppage of a mill for repairs to defective machinery.

A proper amount of "overhead expenses" has been held recoverable during the necessary stoppage of work for repairs.

An item of loss in reduced product, indicating a loss of profits, is not necessarily excluded as special and indirect under the clause of this contract relied upon by the plaintiff.

No. 68, August Term, 1917.

Motion for judgment for want of a sufficient affidavit of defense.

Niles & Neff for motion.
Stewart & Gerber, contra.

December 17, 1917. WANNER, P. J.—The plaintiff's claim of $2045 00 for a balance due on the installation of a drying system in the defendant's paper mill, was met in the affidavit of defense, with a counter claim or set-off of $3414.33, for damages resulting from the stoppage of said mill to repair constructive defects in plaintiff's work.

Without moving to strike off said affidavit of defense under Section 21 of the Practice Act of 1915, P. L. 483, for formal defects therein, and without filing an answer thereto, as is required by Section 15 of said Act, the plaintiff filed this motion for judgment for its entire claim, for want of a sufficient affidavit of defense.

The formal sufficiency of the affidavit of defense, and the truth of its material allegations of fact, must therefore be taken as admitted, and cannot be questioned in this proceeding; Phila. Co. v. Sheehan, 26 Dist. Rep. 463; Pa. Forge Co. v. Del. R. Trans. Co., 24 Dist. Rep. 1017.

On this state of the pleadings where the defendant's counter claim, as in this case, is greater in amount than the plaintiff's entire demand, it has repeatedly been held, since the passage of the Practice Act, 1915, P. L. 483, that a motion for judgment for want of a sufficient affidavit of defense is not proper practice, and must be refused for that reason, and also because a judgment for plaintiff would be manifestly unjust in the face of such an undenied counter claim; Farmers' &c. Co. v. Elliott, 26 Dist. Rep. 436; Pa. R. R. Co. v. Gibbs Milling Co., 18 Luz. Leg. Reg. 467; Pa. Forge Co. v. Del. R. Trans. Co., 24 Dist. Rep. 1017.

The requirement of Sec. 16 of the Practice Act, 1915, that the plaintiff shall in every case file an answer to the defendant's affidavit of set-off or counter claim is clearly mandatory. It lays down and establishes a new course of procedure, and a motion for judgment for want of a sufficient affidavit of defense, cannot be used as a substitute for such an answer.

If permitted it would defeat, or at least, postpone the exercise of the defendant's right to move the court for judgment for want of an answer, or for want of a sufficient answer, to the affidavit of defense; Pa. R. R. Co. v. Gibbs Milling Co., 19 Luz. Leg. Reg. 467.

A motion for judgment for want of a sufficient affidavit of defense is only proper under the Practice Act of 1915, where such affidavit contains no set-off or counter claim.

The answer of the plaintiff to defendant's counter claim may raise either a question of law for the decision of the court, or it may traverse the material facts of the affidavit for trial by jury. This results from the provisions of Sec. 15 of the Practice Act, 1915, declaring that the counter claim shall be treated as the defendant's statment of claim against the plaintiff, and the answer thereto as an affidavit of defense. Both are

thus made subject to the same rules of practice as to form, contents and precedure thereon, as apply to original statements and affidavits of defense.

When the statement, affidavit of defense, or any other pleading is formally defective and not in conformity with the provisions of the Practice Act 1915, the court should be moved to strike it off. Motions for bills of particulars, for more specific pleadings, &c., are no longer proper practice; Cowan v. Blair, 65 Pitts. Leg. J. 702; Ehrenstrom v. Hess, 26 Dist. Rep. 992; Whelan v. Applesby, 26 Dist. Rep. 379; Barto v Shaffner, 26 Diss. Rep. 957; Sturtevant & Co. v. Regan & Hornell, 26 Dist. Rep. 169; Keiser v. Berks Co., 26 Dist. Rep. 839; Wilkesbarre F. & C. Co. v. Brennan, 26 Dist. Rep. 940 (as to defendant's counter claim).

No motion to strike it off having been made in this case, we are of the opinion that the proper procedure is to simply overrule and refuse the plaintiff's motion for judgment, leaving the parties to such further pleadings as are provided for by the Practice Act of 1915.

At the hearing of this motion the argument was not upon the effect of the Practice Act of 1915, but upon the question whether or not the defendant's counter claim is barred by a clause in the contract in suit which provides that plaintiff shall not be held liable for losses resulting from fires, strikes, or other causes beyond its reasonable control, "nor in any event for any special, indirect, or consequential damages whatsoever."

Under this stipulation of the contract, direct damages only would be recoverable by the defendant for any breach of it that might occur.

The general rule of law is that only such losses and expenses are recoverable as direct damages for the breach of a contract as are the natural and proximate, or immediate results of such breach; Jones, &c., Steel Co. v. Wood & Co., 249 Pa. 433; Rakestraw v. Woodward, 25 Pa. Super. Ct. 169; Southern Ry. Co. v. Coleman, 4 So. Rep. 837.

They are described as such as would probably be within the contemplation of the parties, as naturally following a breach of the contract, and must be capable of adjustment by some recognized legal standard. They must not be results contingent upon other intervening causes not directly connected with the breach of the contract complained of; Bunting v. Hogsett, 139 Pa. 363; Township v. Watson, 116 Pa. 344.

Under these general rules it has been held that the wages of idle employees, and similar expenses, during the necessary stoppage of a mill for repairs to defective machinery, are recoverable as direct damages for a breach of contract to furnish proper machinery; Revett v. Globe Nav. Co., 123 Pas. 459; Kenyon v. Goodall & Co., 3 Cal. 257; Singer Mfg. Co. v. Christian, 211 Pa. 543; Kester v. Miller, 26 N. E. 115; Optenberg v. Skelton, 85 N. W. 356; Wade v. Haycock, 25 Pa. 392.

A proper amount of "Overhead expenses" has been held recoverable in such cases, in addition to the wages actually paid to employees during the necessary stoppage of work for repairs; Allen & Co. v. Prov. I. & S. Co., 63 Pa. Super. Ct. 459.

The item of loss in reduced production of paper is less definite than the others and would seem to indicate loss of profits as an element of the damages claimed. But if so, it is not necessarily excluded as special and indirect under the clause of this contract relied upon by the plaintiff.

In different jurisdictions profits lost as the direct result of a breach of contract, if definitely fixed in amount, and not merely speculative in character, are held recoverable as direct damages; Wade v. Haycock, 25 Pa. 382; Hunt v. Or. & Pac. R. R. Co., 36 Fed. Rep. 481; Clyde Coal Co., v. Ry. Co., 226 Pa. 399; Gore v. Melsby, 35 S. E. 315; Wilson v. Wernwag, 217 Pa. 82; Coal & Coke Co., v. Pa. R. R. Co., 229 Pa. 68; Ellsworth v. O'Keefe, 26 Dist. Rep. 277.

From these and similar authorities we reach the conclusion that the items of defendant's counter claim, or set off, are not of the "special, indirect or consequential" class of damages for which the plaintiff is not to be held liable under the above quoted clause of the contract in suit.

Even if the items for loss on production of paper, should be excluded, as speculative, the other two exceed in amount the entire demand of the plaintiff.

We therefore find no sufficient ground in this view of the case on which to sustain a judgment for plaintiff for want of a sufficient affidavit of defense.

The plaintiff's motion for judgment for want of a sufficient affidavit of defense is overruled and refused.

C. P. of Montgomery Co.

Yost v. Yeakle

Distribution—Taxes—Liens—Act June 4, 1901, P. L. 364.

The real estate of defendant was sold upon foreclosure of a mortgage, executed prior to the Act of June 4, 1901, P. L. 364. Claims for Township, School and County taxes were filed with the Sheriff. The Sheriff distributed the entire proceeds, which were less than the amount of mortgage to the plaintiff. HELD, upon exceptions to the Sheriff's distribution, that the plaintiff's mortgage had priority in distribution of the fund.

Exceptions to Sheriff's Distribution.

E. F. Slough, for Plaintiff.

H. N. Stahlnecker, for Exceptant.

September 15, 1917. MILLER, J.—The plaintiff's mortgage of $2500 was executed and recorded in 1891. On its foreclosure the sheriff sold the real estate on June 6, 1917, for $600. The real estate was a store and dwelling combined.

On December 30, 1916, the township of Springfield, in which the mortgaged premises are located, filed in the office of the Prothonotary a claim for township taxes, assessed and levied against them, amounting to $40.91 and, on the same day, the school district of the township filed therein a similar claim of $27.99 for school taxes. Before the sale the treasurer of the township also lodged with the sheriff claims for 1915 and 1916 county taxes amounting to the total sum of $8.62.

The sheriff distributed to the plaintiff the entire proceeds of sale, remaining after the payment of costs, and the exceptions filed to his schedule raise the single question:

If the fund realized by the sheriff of Montgomery county upon a sale of real estate in foreclosure of a mortgage created prior to 1901 amounts to less than is required to pay both the judgment on the mortgage and taxes on the mortgaged premisee, which were assessed and levied after that year, which of the two has priority in the distribution of the fund?

Haspel v. O'Brien, appellant, 218 Pa. 146, which decided that claims for taxes assessed and filed as liens of record after the passage of the act of June 4, 1901, P. L. 364, have priority over mortgages made before that act, in the distribution of the proceeds of sheriff's sales under the mortgages, where such proceeds are not sufficient to pay both liens and mortgages, must be read in the light of its own facts and with especial reference to the repealed legislation, which had been special to Philadelphia and Delaware Counties. That case finally settled that the act of 1901 did not change the existing law in those counties, cities or districts where taxes and municipal claims were first liens prior to its passage, as was the case in those counties.

Such, however, had not been the law in Montgomery County prior to the passage of the act. President Judge Swartz said in 1896 in Fryer v. Metz, 12 M. L. R. 108: "We are not aware of any act of Assembly which makes taxes assessed on seated lands in Montgomery County a lien thereon. In the absence of any statute declaring them to be a lien they become no more than a personal charge against the owner or occupier of the land, * *."

The act of 1901, in its section 2, provided in part that: "All taxes which may be lawfully imposed or assessed on any property in this Commonwealth * * * shall be and they are hereby declared to be a first lien on said property * * *; and such liens shall have priority to and be fully paid and satisfied out of proceeds of any judicial sale of said property before any other obligation, judgment, claim, lien or estate with which the said property may become charged, or for which it may become liable * * *."

The late Judge Weand, in Lukens v. Katz, 27 Pa. C. C. 596, soon thereafter, decided that a mortgage recorded before the passage of the act was not affected by it and took priority over the lien of taxes because the legislative intent was thereby to make future taxes liens and only liens as against other future encumbrances, thus avoiding any question as to the disturbance or interference with a lien which had attached prior to the passage of the act, and in Caner v Bergner, 27 Pa. Sup. Ct. 220 which was another Montgomery County case, it was decided in 1905, that "a claim for taxes assessed and levied by a township subsequent to the passage of the act of June 4, 1901, P. L. 364, has no priority over a mortgage executed and recorded prior to the passage of the act, in the distribution of the proceeds of sale of real estate on *levari facias*."

See also in re: Prince & Walter, 14 P. D. R. 172.

We are, therefore, of the opinion that the plaintiff's mortgage has priority in distribution of the fund and find it unnecessary, in reaching this conclusion, to decide whether, if the two tax claims were properly filed, they were or were not divested by the sheriff's sale.—See Bellevue Borough v Umstead, 38 Pa. Sup. Ct. 116.

After hearing, the exceptions are dismissed, and the sheriff is directed to pay out, in accordance with his schedule of distribution, the money mentioned in his return.

C. P. of Lancaster Co.

Sheaffer v. Pennsylvania Railroad Co.

Statement—When sufficiently specific—Damages by spark from locomotive.

In an action against a railroad company for damages for injury by fire to property adjoining its tracks alleged to have been caused by sparks from a defective smoke-stack on a locomotive the plaintiff should not be compelled to file a more specific statement, although his statement fails to give the number of the locomotive, the direction in which it was going or the time of day, and avers that these facts are unknown to the plaintiff.

A more specific statement will not be required in relation to matters as to which the defendant should have as much knowledge as the plaintiff.

Rule for more specific statement.

John A. Nauman, for rule.
F. S. Groff, contra.

September 22, 1917. LANDIS, P. J.—The original statement filed by the plaintiff alleged that he was, on November 2, 1914, the owner of a tract of land in Sadsbury township, in this county, and that the defendant company was then operating the Atglen and Susquehanna Branch of the Pennsylvania Railroad, known as the Low-Grade Road, along the plaintiff's said lands; that the company, about midday of the said November 2, 1914, negligently and carelessly operated, on its said line, close to the plaintiff's land, an engine, drawing a train or trains, the property of the defendant, the smokestack or flues of which was defective, in that it emitted large sparks in great quantities and in such a manner that the grass fields and fences of the plaintiff were negligently and carelessly ignited and set on fire by a spark or sparks from the said locomotive, and that the grass and vegetation on about four and a half acres were destroyed, together with about forty panels of fence. It was further alleged that the company did negligently and carelessly permit grass and weeds to grow up and become dead on its right-of-way, and close to the plaintiff's land, and did throw old ties on its right-of-way, near the plaintiff's land, and, on the day in question, did operate an engine or engines drawing trains equipped with defective and ineffective spark-arresters which emitted sparks of unusual size, in large quantities, in such a manner that the said grass, weeds and ties were set on fire, thereby igniting the grass and fence on the plaintiff's land.

It was also alleged that, on Wednesday, February 10, 1915, the same conditions existed, and thereby the same four and a half acres were again burned over, and ten panels of fence were destroyed. Some other allegations are, perhaps, contained therein, which are at this time immaterial.

The defendant entered a rule for a more specific statement. The numbers of the engine or engines, which it is alleged caused the fire or fires, are demanded; the time of day when the fire occurred is asked for, and the direction in which the engines were running. The plaintiff thereupon filed an amended statement. He changed the date of the first fire to Wednesday, November 11, 1914, about midday. He stated that the number of the engine drawing the train was unknown to him, but that it was going in a westerly dirction. As to the second fire, he stated that both the number of the engine and the direction in which it was going were unknown to him, as was also the time of day.

I cannot see what good objection now exists to the statement, so far as relates to the first claim for damages. The plaintiff says that the fire was about midday on a specific date, and that the engine which caused the damage was going westerly. He does not know the number of the engine; but the defendant, with these facts before it, certainly has a better opportunity for obtaining the numbers of the engines passing in this direction about this time than the plaintiff has.

In Brauer v. Moore, 24 Lanc. Law Review 303, this court held that a more specific statement will not be required in relation to matters as to which the defendant should have as much knowledge as the plaintiff.

Courts do not require of litigants impossible things. The plaintiff could demand of the defendant the numbers of all such engines, but even then he would be unable,

most likely, to pick out the alleged defective engine; and the defendant, therefore, has now as much information upon the subject as the plaintiff would have if his demand was complied with. It would, therefore, be useless to thus furnish what he had obtained.

As to the second fire, it is true he gives no information, except an approximate date. This undoubtedly is very uncertain information, but if he, on the trial, cannot prove the fire and its cause about the time alleged, and connect up the defendant with its origin, he cannot recover. He will not be permitted to guess. What he does not know and cannot prove he cannot assert in his statement and cannot recover for. Under the present situation, I think the rule should be discharged.

Rule discharged.

C. P. of Allegheny Co.

Jones & Whitaker v. Kunkle

Replevin—Automobile—Conditional Sale—Words "Lessor" and "Lessee"—"Buyer" and "Seller"—"Rent."

Judgment was entered for defendant where it appeared in replevin that defendant purchased an automobile from one who had failed to make all the payments or comply with the conditions of an agreement, of which defendant had no knowledge, when the agreement upon which the original sale had been made in another state, was a conditional sale and not a lease.

In an instrument, providing for the sale of an automobile and the payment of installments for the unpaid balance of the purchase money, the words "lessor" or "lessee" were not used, but the parties were designated as "seller" and "buyer" and the word "rent" as used was equivalent to "liquidated" damages, and it was not clear that a bailment was intended, the court on a rule for want of a sufficient affidavit of defense in replevin determined that it was a conditional sale and not a bailment, discharged the rule and entered judgment for defendant.

Rule for Judgment for Want of a Sufficient Affidavit of Defense.

J. E. Little, Jos. R. Conrad and *Alexander E. Eckles* for plaintiff.

A. C. Christiansen for defendant.

October 3, 1917. REID, J.—This is a rule for judgment for want of a sufficient affidavit of defense.

The action is in replevin..

The facts are all apparent upon the record, and are briefly as follows:

Jones-Whitaker Sales Company of the City of Indianapolis, Indiana, and Victor George Smith of Kokomo, same State, entered into the agreement a copy of which is appended to the statement of claim, wherein the plaintiff is styled the "Seller" and said Smith the "Buyer," by virtue of which, for the consideration therein specified, said "Buyer" became the possessor of a certain Chevrolet automobile. The price of the automobile was $585.20, of which the "buyer" paid $250.00 in hand and agreed to pay the balance in monthly payments of $27.95 until the whole purchase price should be fully paid, with interest at 6% on the deferred payments. Provision was made that title should remain in the "Seller" until the purchase price should be fully paid.

The "Buyer" agreed inter alia, "not to part with the possession of said property or to remove it from the State without the written consent of the "Seller." Said buyer, however, disregarded his agreement to make such additional payments and not to remove the property from the State of Indiana, but brought it into the State of Pennsylvania and sold it for a valuable consideration to the defendant, Albert Kunkle, who had no knowledge of any defect of title, and is admitted to be an innocent purchaser.

Plaintiff replevied the automobile in the hands of said Kunkle, who gave a counter bond, and thereafter, in reply to the plaintiff's statement of claim, filed an affidavit of defense averring his purchase from said "Buyer" for value, without knowledge of any limitation in the title of said Smith, and averring that the agreement referred to between said "Seller" and "Buyer" constituted a conditional sale, and not a bailment—vesting title in his, said defendant's, vendor as against the "Seller."

The motion for judgment raises the sole question as to whether such instrument Exhibit "A" of plaintiff's statement, was, under the law of Pennsylvania, a conditional sale or a bailment.

Exhibit "A," the contract appended to the statement of claim, in our judgment, has all the marks of the instruments which the courts of this State have held to evidence conditional sales and not bailments.

We are aware that it is not what the parties call the agreement that controls its legal effect—and that the intention of the

parties, as drawn from the instrument, must prevail as against mere designations of the thing.

But, nevertheless, the presence or absence of the terms which usually indicate an intention to make the depository of the chattels a bailee, has great weight in determining the meaning of the parties; Kelly Road Roller Co. v. Spyker, 215 Pa. St. 332.

In our opinion, the contract in question in the case at bar is open to the criticism of that in the case cited above:

"There is nothing about this agreement that suggests a bailment except the use of the word 'lease' in the first line and the word 'rental' in the supplement. But these words were evidently used to give another name to what was meant to be a conditional sale. The agreement has none of the indications of a lease. There is no term mentioned, and there is no provision for the return of the roller except in case of default in making monthly payments. Although fixing a term and providing for a return at the end thereof, may not be essential to a bailment, they are important and often controlling evidence of the intention of the parties."

The instrument which plaintiff maintains is a bailment has less of the evidence of such intention on the part of the contracting parties, than any other which has come under our observation.

In the top line, in bold capitals, it is entitled "Contract for Purchase of Automobile." The term "lessor" or "lessee," "bailor" or "bailee," is nowhere used—nor are the terms, "let" "leased" "bailed" or other phrases of a similar nature usual in contracts or bailment anywhere found. On the contrary, the parties are throughout designated as "seller" and "buyer."

The term "rent" is used but once, appearing in the 5th paragraph in connection with the right of the seller, who may, at his option, "either declare the entire balance of the purchase price due and collectible, or may rescind this contract to sell and take possession of the property * * * without notice; and in the event of such rescission all payments already made by the buyer shall be taken and retained by the seller, not as penalty, but as rent for said property and liquidated damages for the breach of this contract. * * *" It will be seen from the above that the word "rent" is only an equivalent term for "liquidated damages" and does not, standing thus alone, stamp this instrument as a lease or bailment.

The cases of Morgan-Gardner Electric Co. v. Brown, 193 Pa. 351, and Farquhar v. McAlevy, 142 Pa. 233, are also in point as to the inadequacy of the word "lease," to constitute a bailment under the facts thus presented, and as to the necessity of a provision for the return of the property to the alleged lessor, in order to affect a legal lease or bailment.

No such return, at the end of any term or period, is stipulated for in the case before us, except that incident to the failure of the "Buyer" to make payment.

Of such a provision, McIlvaine, P. J., in the opinion of the trial court, Morgan-Gardner Electric Co. v. Brown, 193 Pa. at pp. 357-8 (affirmed by the appellate court on that opinion), says:

"This provision was not put in the contract to insure the return of the property to the Electric Company, 'so that it might have its own again,' but to insure the payment of the notes, so that the property might remain in the possession of the Coal Company as its own. It was a contract remedy to enforce payment, not of hire, but of purchase money."

The case of Enlow v. Klein, 79 Pa. 488, relied upon as supporting plaintiff's contention that exhibit "A," constitutes a bailment, does not, under the facts of this case, support the proposition.

To use the term "to furnish within ten days" does not bring the case within the decision of Enlow v. Klein. Woodward, J. in that case explicitly says:

"The use of such a word as furnish, vague as it is in its signification, would leave the clause in which it occurs of ambiguous import, if there were nothing besides to indicate the sense in which it was employed. It might imply a sale, a lease, a loan, a gift or a delivery of a chattel in payment of a debt, in accordance with its context and its subject matter.

Of the case of Enlow v. Klein, Paxon, J., in Stadfeld v. Huntsman & Company, 92 Pa. St. at p. 57, says:

"An examination of the facts shows, that it was a case of hiring; that $2 per week of the sum to be paid, was for the use or hire of the horses. This clearly appears in the report of the facts * * *. This was an important feature of the case in our consultation, and is referred to now that it may not be misunderstood hereafter. Enlow v.

Klein was fortified by the authorities, and we do not propose to disturb it. But we will not take one step beyond it. We stop just where it ends."

The instrument before us, Exhibit "A," does not, taking it in all its details, present, or suggest the idea, that the monthly payments of $27.95 are fixed as compensation for the use or hire of the automobile in question.

In Farquhar v. McAlevy, 142 Pa. at p. 240, the Per Curiam opinion of the appellate court again says:

"Enlow v. Klein * * * stands on its own peculiar facts, and, to that extent, is authority; but, as remarked in Stadfeld v. Huntsman * * * we will not go one step beyond it."

It is urged by plaintiff that the contract in question presents the case of an agreement to sell in futuro, which never became executed through the failure of the "Buyer" to comply with its terms, the language of Exhibit "A" being, in part, as follows:

"The Seller, in consideration of the payments and conditions herein set forth to be performed by the Buyer, does hereby agree to furnish within ten days after the date of this agreement to the Buyer, and agrees to sell to the Buyer, subject to the conditions hereinafter contained, the following described personal property * * *."

This was followed by the actual delivery to the Buyer, of the automobile in question and the payment of $250 required as hand money.

That such possession as was yielded to the Buyer, notwithstanding the phraseology as to a future fulfilment of conditions, is one of the chief marks of ownership, under contracts for conditional sales is apparent in Ott v. Sweatman, 166 Pa. 217. In that case, in the opinion of Jenkins, J., at p. 222 (affirmed by the appellate court), it is said: "* * * and in doubful cases the court in construing the contract has been governed by the principle that 'possession of personal property is the great mark of ownership.'"

In the case of Harper v. Hogue, 10 Supr. Ct. 624, the question presented here, that the contract was to be executed in futuro, and therefore no present title passed, was raised. The contract there was that "The party of the first part agrees that he will sell and transfer to the party of the second part on the fulfilment of the covenants and conditions hereinafter contained"—a portable saw mill and fixtures.

Beeber, J., in the opinion of the Court at pp. 633-4, says:

"It is argued that because the agreement provides that Harper 'will sell and transfer to the party of the second part on the fulfilment of the covenants and conditions hereinafter contained,' it shows an intent that there is to be a sale only after the full payment of the purchase money. * * * Some strength might be conceded to this argument if it appeared that possession of the mill was taken in pursuance of some terms of the agreement showing a lease or bailment. * * *" The agreement provides for nothing but a sale,—reserving title and calling payments rental, it is true, but still speaking only of a sale. The use of the word 'will' applies as well to the word 'transfer' as it does to the word 'sell' and the seller himself has put a construction on this by delivering the mill at the time of the execution of the articles of agreement. By the use of this word under such circumstances he does not seem to have meant so much to emphasize the time when he would sell in the future, but rather to express a present intent, which was to sell.'"

The rule for judgment for want of a sufficient affidavit of defense must be discharged. We also enter judgment for the defendant for the property in controversy.

Emig v. Keystone Wire Cloth Company

Appeal—Bail for Costs—Mandamus

Defendant, within six days after judgment had been rendered against him, appeared before the Alderman with his bondsman, and asked for an appeal, tendering the costs of the transcript, and offering a bond for the debt, interest and costs. The Alderman refused to grant an appeal unless the costs already accrued were paid. Subsequently defendant again appeared at the Alderman's office, but the latter was absent because of sickness, and the twenty days expired without an appeal being taken. HELD, on a petition for a mandamus, that the petition must be granted.

Ehrehart & Bange, for petition.

W. A. Miller, contra.

No. 4, August Term, 1917.

Application for Writ of Mandamus.

January 7, 1918. ROSS, J. —This case was brought into court by a petition of the Keystone Wire Cloth Company praying that a writ of Mandamus be issued to Walter F. Owen, an Alderman for the First Ward of the City of York, command-

ing him to deliver a transcript of appeal in the case of Charles H. Emig, plaintiff in a suit brought before the said Alderman against the above named defendant; in which suit the said Alderman had entered judgment against the said defendant.

An answer was filed to the petition and testimony was taken in support of the contentions of the respective parties. From the evidence we find the following facts:

1. On the 17th day of March, 1917, suit against the Keystone Wire Cloth Company was entered before Walter F. Owen, Esq., (an Alderman for the City of York, Pa.) by Charles H. Emig and on said day a summons was issued, directed to the Keystone Wire Cloth Company, commanding said defendant to be and appear before the said Alderman, &c., on the 23rd day of March, 1917, between the hours of nine and ten o'clock A. M.

2. At the time fixed for the hearing the defendant did not appear and judgment was entered against it in favor of the said Charles H. Emig, for the sum of two hundred sixty-nine dollars and ninety cents, with costs.

3. On the 29th day of March, 1917, W. F. Kintzing, General Manager of said Keystone Wire Cloth Company, appeared at the office of said Alderman, and demanded an appeal from said judgment, stating that he had his bondsman with him and desired to give bond for the debt, interest and costs upon the affirmance of the judgment, and offered to pay the sum of one dollar and fifty cents, the costs of the transcript of appeal.

4. The Alderman refused to grant an appeal to the defendant unless the whole of the costs incurred would be first paid by the defendant to him, and several days later wrote the defendant to that effect.

5. On the 12th day of April, 1917, the General Manager of the defendant Company, with a bondsman or surety, Mr. John J. Schmidt, again visited the office of the Alderman for the purpose of perfecting his appeal by entering bond and making the necessary affidavit.

The Alderman was at that time confined at his dwelling house by sickness which rendered him unable to attend to the duties of his office; consequently defendant did not take its appeal within the twenty days from the entry of judgment.

6. The petition for mandamus was presented to the Court and filed April 17th, 1917.

The evidence divulges that the Alderman was mistaken in his conception of the duties of an Alderman and the rights of a party litigant. The law is quite plain and reads as follows: "If any appellant shall give good and sufficient bail absolute, for the payment of debt, interest, and costs that have and will accrue on affirmance of the judgment, the appellant shall not be required to pay any costs before taking an appeal;" Act approved May 29th, 1907, P. L. 306. It, therefore, was the duty of the Alderman to allow the petitioner to appeal from his judgment upon a compliance with the above cited law; Cambria Auto Co. v. Frischkorn, 54 Pa. Super. Ct. 272; Snyder v. Bauer, 18 Dist. Rep. 639.

The peremptory writ of mandamus is awarded as prayed for.

C. P. of Schuylkill Co.

Eroh v. Payer

Mechanics Lien—Section 10, Act of June 4, 1901, P. L. 432.

Section 10 of the Act of June 4, 1901, P. L. 432, requires that the claimant in a mechanic's lien issue a scire facias against the owner within two years of the filing of the lien unless the owner in writing filed before the expiration of such time, waives the necessity for so doing for a further period not exceeding three years; if the plaintiff fails to comyly with this Act the lien may be stricken off.

Rule to strike off Lien.

J. H. Garrahan for Rule.

G. W. Ryon, Contra

November 12, 8917. BERGER, J.—This is a rule to strike off a mechanic's lien on the ground that the claimant has failed to issue a scire facias against the owner within two years of the filing of the lien, as is required by Sec. 10 of the Act of June 4, 1901, P. L. 432. The lien was filed June 5, 1915, and the rule to strike it off was taken September 10, 1917.

J. A. Eroh, the assignee of the claimant of H. E. Eroh, made answer to the said rule in which he avers that he and his counsel, George W. Ryon, Esq., and the owner and her counsel, George Striegel, Esq., after various meetings between the parties during the two years subsequent to filing the lien, agreed that the claimant should be adjusted out of Court, and that pending an adjustment no proceedings would be taken upon the mechanic's lien; and failing in an adjustment, proceedings might then be taken

as though no delay had occurred. That the negotiations continued until sometime in August, 1917, when the owner, through her attorney, agreed to pay to the claimant's attorney the amount of the lien less $125 in full settlement of it. The answer of the claimant is supplemented by an answer filed by his counsel, George W. Ryon, Esq., who, in addition to the above recited facts, avers that he had a conversation with counsel for the owner in the spring of 1917 about placing the case upon the list for trial but that he agreed not to do so upon the representation by counsel for the owner that the case could not go to trial on account of the owner's illness. It is further averred that the owner has repudiated the agreement of her counsel for the settlement of the said case because she is in league with another of her creditors in an effort to avoid the lien, and request is made to the Court, in said supplemental answer, to allow the issuance of a writ of scire facias nunc pro tunc.

The case is before the Court for disposition on petition and answer. Counsel for the rule to strike off the lien agrees that the facts set forth in the original, and in the supplemental answer, are correct. The question to be determined is whether, upon the admitted facts, the rule to strike off the lien must prevail, or whether the Court has power to authorize the issuance of a scire facias nunc pro tunc.

Section 10 of the Act of 1901, supra, requires a scire facias upon a mechanic's lien to be issued within two years from the date upon which it is filed, unless the owner in writing, filed before the expiration of said time, waeves the necessity for so doing for a further period not exceeding three years. The said section also provides that if a lien be not prosecuted in the manner and at the times aforesaid, it shall be wholly lost.

It is admitted that the lien in question was not prosecuted in accordance with the statutory requirements. The reasons for the failure to do so are set forth in the answers to the rule to strike off the lien. Whatever our view might be in the absence of the plain terms of the statute, we are of the opinion that the statute is mandatory, and that the Court cannot give the claimant the relief prayed for. See Sterling B. Co., Appellant v. Syria Improvement Association, 226 Pa. 475; Haas v. Schmidt, 26 D. R. 293.

The rule to strike off the lien must, therefore, be sustained.

The rule to strike off the mechanic's lien in the above stated case is made absolute, and the said lien is directed to be stricken from the record.

Messiah Orphanage v. Monaghan Twp. School District

Mandamus—Right to Sue—Tuition.

Plaintiff, a duly incorporated orphanage, sued out, in its own name, a writ of mandamus to compel defendant school district to furnish schooling to certain of its minor inmates, under the Act of May 9, 1913, P. L. 192. The defendant moved to quash the writ, because plaintiff was not a party beneficially interested in the enforcement of the law. HELD, that the writ must be quashed.

Plaintiff is not pecuniarily interested in the enforcement of the School Board's alleged public duty, as the cost of such tuition would be payable by the several school districts in which the respective children have their legal residences.

Nor has it such a beneficiary interest, or is it such legal representative of the personal interests of these children, as will entitle it to sue out a writ of mandamus in its own name.

The Act of May 9, 1913, P. L. 192, provides that when an alternative writ of mandnmus is sued out "to procure the enforcement of a public duty," the proceedings shall be prosecuted in the name of the Commonwealth on the relation of the Attorney General or of the District Attorney of the proper county, as the case may require.

No. 47, October Term, 1917.

Alternative Mandamus.

Motion to Quash.

S. B. Meisenhelder, for motion.
R. S. Spangler, contra.

January 7th, 1918. WANNER, P. J.—This alternative mandamus was issued on the petition of the "Messiah Orphanage" of Monaghan Township, York County, Pa., to compel the School Directors of said township to furnish schooling to certain minor inmates of said institution, under the mandatory provisions of the Act of May 9th, 1913, P. L. 192.

It alleges that plaintiff's demand for tuition of said children in the public schools of said township was refused by defendants, and that when they were sent in pursuance of said demand to the nearest public school, they were refused admission by the teacher in charge of the same.

The defendants now move the Court to quash said writ because it was sued out by

the plaintiff in its own name, instead of in the name of the Commonwealth on the relation of the District Attorney of York County, for the reasons (1) That the "Messiah Orphanage" is not a party which is itself "beneficially interested" in the enforcement of the law. (2) It is not alleged in the petition that these children had no parents or guardians of their persons, who might sue out the writ in their interest.

The other objections are general and go rather to the merits of the case, than to the regularity of the proceedings.

The Act of 1913, supra., provides that when an alternative writ of mandamus is sued out "to procure the enforcement of a public duty," the proceedings shall be prosecuted in the name of the Commonwealth on the relation of the Attorney General or of the District Attorney of the proper County, as the case may require.

A private citizen, having no personal interest in the matter other than that which is common to all other citizens of the District, cannot sue out the writ in his own name; Vide cases 3rd Purd. Dig. (13th Ed.) 2426, notes (s) and (r).

In Kaine et al. v. Comth. ex rel. Manaway, 101 Pa. 490, the father of the child who had been refused admission to the public schools, on account of its color, sued out the writ in his own name and no question was raised as to his right to do so, probably because of his personal interest in his son, or because as his natural guardian he represented the son's interest in the enforcement of the law.

But in the very recent case of Comth. ex rel. Wait v. Schumaker et al., 255 Pa. 67, which case, like this, was for the enforcement of the statutory right of children inmates of an Orphans' Home to tuition in the public schools, the writ was sued out on the relation of the District Attorney of the County.

In this case the "Messiah Orphanage" itself does not appear to be pecuniarily interested in this matter, as the tuition of its pupils in the public schools would, under the terms of the Act of 1913 itself, be payable by the several school districts in which the respective children have their legal residences.

It may be, too, that these children have parents, or legal guardians, who would be the proper parties to sue out a writ in their interest, as nothing to the contrary appears in the plaintiff's petition for this writ.

No quasi parental relation, or guardianship of these children, in the petitioner, can be presumed merely from the fact of their being inmates of this Orphanage; Black v. Graham et al., 238 Pa. 381.

The plaintiff, therefore, on the allegations of the petition itself, has no such legal standing in court, either as one having "beneficiary interest" in the enforcement of this alleged public duty of the School Board, or as the legal representative of the personal interests of these children, as entitles it to sue out this writ in its own name. For these reasons it should be quashed in order to secure statutory regularity of proceedings, and permanency of results in this case.

The rule to show cause is made absolute, and the writ of mandamus is quashed.

C. P. of Montgomery Co.

Elkins v. Rosenberger

Damages—Joint Defendants—Husband and Wife.

Plaintiffs brought suit against husband and wife for the recovery of damages, which, according to the statement of claim, were the result of an assault committed by the wife "in the presence of her husband." The defendants were not alleged to have been tort-feasors, neither was any concert of action averred or shown. The testimony clearly showed that the husband defendant was not an active tort-feaser; that he did not either actively or passively participate in the alleged assault by his wife upon plaintiff; that he was not present when it occurred and that when he returned his only act was to take or pull his wife away from the scene. HELD, on a motion to take off compulsory non-suit that "upon the record as it stood at the time of the trial, and upon the plaintiffs' evidence, no verdict could have been properly rendered against anyone."

Motion to take off compulsory non-suit.

James M. Simms and *Harold G. Knight*, for Plaintiff.

J. Ambler Williams, for Defendant.

October 31, 1917. MILLER, J.—The plaintiffs were servants of the defendants at their residence in Elkins Park, this county. The plaintiff husband was the chauffeur and his wife acted as mother's helper and made herself generally useful about the household. They occupied rooms over the garage.

Mrs. Elkins became dissatisfied with these quarters and the plaintiffs decided to leave their employment. Before their departure, on the evening of January 19, 1916, Mrs. Elkins went alone to the house, met Mr.

Rosenberger in the second floor hallway and asked him for the wages she claimed to be then due. He left her standing in the hallway and entered a bed-chamber to get the money. She testified that he went out of her sight and that she did not know where he had gone—"he had left my presence."

During Mr. Rosenbergers absence, his wife came into the hallway, whether from the room he had entered, or elsewhere, we are not clear in our recollection, and, finding Mrs. Elkins there, it is claimed, committed an unprovoked assault upon her. It was over when Mr. Rosenberger returned with the money. He immediately took his wife away.

Daniel Elkins and his wife then brought this suit against both the Rosenb rgers for the recovery of damages and in their statement of claim set forth that the assault was committed by Mrs. Rosenberger "in the presence of her husband." The defendants were not alleged to have been joint tort-feasors, neither was any concert of action averred or shown.

A compulsory non-suit was entered at the close of the plaintiffs' case and we now have this motion to take it off.

It should be noted that, before the non-suit was entered, the plaintiffs were afforded an opportunity to discontinue as to the husband defendant and amend their statement accordingly. This they declined to do.

It may be conceded that, under the facts shown, this suit was properly brought under the common law; Hess v. Heft, 3 Pa. Sup. Ct. 582.

The act of June 8, 1893, P. L. 344, in its section 3, provides, in part, however, that: "Hereafter a married woman may sue and be sued civilly in all respects and in any form of action and with the same effect and results and consequences as an unmarried person * * * * nor may she be arrested or imprisoned for her torts."

In Gustine, appellant, v. Westenberger, 224 Pa. 455, the appellee's wife had induced her brother to personate her husband in executing a mortgage and acknowledging it before a notary public. A writ of scire facias was afterwards issued for its collection. The appellee defended by claiming his signature to the mortgage to have been forged and denying that he had acknowledged it. The verdict and judgment were in his favor. On appeal, the judgment was affirmed.

The trial judge having refused the following point for charge: "If under all the evidence in the case the fraud in the case was that of defendant's wife, the husband would in law be answerable for this to the plaintiff as for his own fraud and the verdict should be for the plaintiff," it was argued to the contrary on the appeal, that the husband was answerable for the torts of his wife committed after marriage.

The Supreme Court, speaking through Mr. Justice Brown, says of this contention: "We know of no rule of law that ever permitted a husband's property to be taken from him on a deed forged by his wife, or the forgery of which was procured by her. Since the passage of the act of June 8, 1893 P. L. 344, a married woman may be sued civilly in all respects and in any form of action with the same effect and results and consequences as an unmarried person, except that she may not be arrested or imprisoned for her torts. Under that act she, and not her husband, is liable in damages for her torts."

In Smith v. Machesney et al., appellants, 238 Pa. 538, the plaintiff sued both husband and wife, defendants, for the recovery of damages for personal injuries sustained by her being injured in stumbling over the edge of a freight elevator, which, it was claimed, had been negligently permitted to project above the side-walk in front of real estate that was owned by the defendant wife. No claim was made against her husband as an actual tort-feasor. The defendants appealed from a judgment against them entered on a verdict in favor of the plaintiff. Mr. Justice Potter, speaking for the Supreme Court, said: "The liability for which recovery is sougbt is based entirely upon the ownership of the property by the wife. It is not contended that either husband or wife was present when the tort was committed, or that the husband was personally guilty of the negligence which caused the injury to the plaintiff. The neglect of duty charged was that of the wife's employees, for which she would be responsible. The husband seems to have been joined as a defendant in this case under the idea that the common law liability of the husband for the torts of the wife still prevails. But whatever may have been the rule at common law, we held in Gustine v. Westenberger, 224 Pa. 455 (460): 'Since the passage of the act June 8, 1893, P. L. 344, a married woman may be sued civilly in all respects and in any

form of action with the same effect and results and consequences as an unmarried person, except that she may not be arrested or imprisoned for her torts.

Under that act, she and not her husband, is liable in damages for her torts. In the present case it was, therefore, not only unnecessary but improper to join the husband as a defendant. We do not understand that the claim in this case was made against the husband as an actual tort-feasor, but only by reason of his supposed responsibility for the tort of his wife." The judgment against the husband defendant was, therefore, reversed.

In Wollaston v. Park, appellant, 47 Pa. Sup. Ct. 90, in which the judgment of the lower court in favor of the plaintiff was affirmed, it, at the trial, had refused a point to the effect that "the defendant's husband is liable for the defendant's torts and as he has not been joined as co-defendant with her in this suit the verdict must be for the defendant," and this refusal had been assigned as error. We do not see that, as contended by the plaintiff, this case is at variance with those above mentioned, upon the authority of which the non-suit in the case at bar was entered.

The testimony in this case was not transcribed and we have nothing but our own trial notes before us. They clearly show that the husband defendant was not an actual tort-feasor; that he did not, either actively or passively, participate in the alleged assault by his wife upon Mrs. Elkins; that he was not present when it occurred; and that when he returned, his only act was to take or pull his wife away from the scene.

There was no concert of action between himself and his wife. His first act, upon his return, was one of repudiation of her conduct.

Under these facts there was, as we understand the authorities cited, no liability on his part and he was improperly joined as a defendant.

As stated, we suggested at the trial that the error be corrected, but the suggestion was declined. This left no alternative except to enter the compulsory non-suit and such was done for this reason alone, and without reliance upon the further fact that the plaintiffs declared on a tort committed by the wife "in the presence of her husband" while their proof showed that the act was done when he was "out of sight;" elsewhere in the house; and after he "had left my" (Mrs. Elkins') "presence." This was a material variation between the allegata and probata.

As we view the case, "upon the record as it stood at the time of the trial, and upon the plaintiffs' evidence, no verdict could have been properly rendered against anyone."

The motion to take off compulsory non-suit is overruled.

C. P. of Lackawanna Co.

Bailer's Appeal

Appeal from report of township auditors—Filing of recognizance—Act 15 April, 1834, P. L. 556.

An appeal from township auditors' settlement of the township treasurer's account will be stricken off where no recognizance was filed within thirty days from the time of the settlement, as required by Sec. 104 of the Act of 15 April, 1834, P. L. 556.

Rule to strike off appeal.

M. J. Martin, for Appellant.

J. W. Carpenter, for Appellee.

December 21, 1917. EDWARDS, P. J.—The appeal in this case was allowed and filed on February 8, 1915. The petition for the appeal states that the treasurer's account was audited on January 10. The specification of the grounds of the appeal was filed on February 10, and the auditors' report was filed on January 12. The bond, or recognizance, was not filed until February 13. Whichever of two of the above dates is taken—January 10, when the account was audited, or January 12, when the auditors' report was filed—the recognizance was filed too late.

In such a case, under the Act of 1834, the appeal must be made from the settlement by the auditors within thirty days after such settlement, "provided that no appeal by such officer shall be received unless the appellant shall enter into a recognizance with two sufficient sureties, conditioned to prosecute the appeal with effect," etc. It has been decided that an appeal without a recognizance is a nullity and that the time to enter into a recognizance is limited to the thirty days; McCready v. McGovern et al., 1 Kulp 474.

The rule is made absolute and the appeal is stricken off.

Baltimore and Harrisburg Railroad Co. v. Hanover and McSherrystown Street Railway Co.

Bond—Death of Sureties—Jurisdiction.

To settle a controversy between a steam railroad company and a trolley company, concerning grade crossings, the latter gave a bond to cover all damages that might accrue at said crossings by reason of the negligence of itself, its officers, agents or employees. Subsequently there was a change of sureties, and when the second set of sureties were all dead, the plaintiff railroad company petitioned for a new bond. HELD, that the petition must be granted.

Tnere being no past or present claim during the life of the sureties, nor any credit which could have been obtained because of their names on the bond, it is plain that no liability under the bond now exists for which the sureties could be held liable.

The Public Service act of June 26, 1913, P. L. 1408, provides that "nothing in this act contained shall in any way abridge or alter the existing rights of actions or remedies in equity or under the common or statutory law of the Commonwealth."

The decree providing for a bond issued out of a Court of Equity on August 30, 1893, and has been in force ever since. It is such a condition as the legislature apprehended when it passed the section (29) above referred to.

No. 2, August Term, 1893.

Rule to file bond.

Geo. S. Schmidt, for rule.

T. F. Chrostwaite, contra.

January 14th, 1918. Ross, J—The essential facts of this case are as follows:

1. On August 30th, 1893, in a suit entered by the "Baltimore and Harrisburg Railway Company" and the "Western Maryland Railroad Company," as Plaintiffs, against "The Hanover and McSherrystown Street Railway Company" as defendant, this Court entered a decree, relating to certain grade crossings, of which the following was a part.

"7. That the Hanover and McSherrystown Street Railway Company shall enter into a bond with surety or sureties to be approved by the Court conditioned to indemnify and save harmless the plaintiffs against all suits, actions, claims, demands and damages by all persons on account of any accident at either of said crossings occasioned by the negligence of said defendant, its officers, agents or employees, said bond to be in the sum of twenty thousand dollars, before constructing the said crossings, costs of equity proceedings pending to be paid by the Hanover and McSherrystown Street Railway Company."

2. On September 6th, 1893, the defendant, above named, in accordance with the above decree, filed in said Court its bond in the sum of twenty thousand dollars, with Charles E. Ehrehart, Samuel L. Johns, and Lewis D. Sell, as sureties, which bond was approved by the Court.

3. On March 1, 1909, the defendant filed its petition in court, praying that it be permitted to substitute a new bond for the said bond approved September 6th, 1893; on the same day the Court made an order and decree allowing the new bond to be filed in lieu of and as a substitute for the said bond filed on the 6th day of September, 1893, and discharging and relieving the above named sureties on said last mentioned bond from all further liability thereon, which new bond in the sum of twenty thousand dollars drawn in conformity with the said decree made on Angust 30th, 1893, and signed by William H. Lanius, John W. Steacy and George P. Smyser, as sureties, was on said March 1st, 1909, duly filed in, and approved by the Court; counsel for the plaintiff consenting to the filing and approval thereof.

4. Subsequently, the said "Baltimore and Harrisburg Railway Company" and other railroad companies were merged with the said "Western Maryland Railway Company" under the laws of Pennsylvania, and consolidated into a single corporation by the name, style, and title of "Western Maryland Railway Company," possessing within the Commonwealth of Pennsylvania all the rights, privileges and franchises of each of the corporations so consolidated; among the rights and properties so acquired was the ownership and right to maintain and operate the railroad of the "Baltimore and Harrisburg Railway Company," at the crossings referred to in the said Court's decree of August 30th, 1893.

5. The said "Western Maryland Railway Company," now presents a petition averring "that all of the sureties on the bond of the above named defendant, filed in this court on March 1, 1909, are dead, said George P. Smyser and W. H. Lanius having respectively died on the 28th day of February, 1912, and on the 21st day of January, 1913, and their estates have here-

tofore been distributed in due form to the parties entitled thereto and are not subject to the lien of said bond. That the remaining surety, John W. Steacy, died on the 2nd day of March, 1917, and that the obligation of said bond will, at an early date, cease to be a lien upon the real estate of said last named surety."

6. The prayer of the petition is "That the Hanover and McSherrystown Street Railway Company, defendant in the said proceeding, be ordered and decreed to enter into and file with * * (this) Court, a bond with surety or sureties to be approved by the Court, conditioned to indemnify and save harmless your petitioner, the successor of the plaintiff in the above lien, against all suits, actions, claims, demands and damages by all persons on account of any accident at either of said crossings occasioned by the neglect of the defendant, its officers, agents or employees, said bond to be in the sum of twenty thousand dollars."

7. The defendant's answer does not deny the averments of plaintiff's petition, but says, that the estates of the said deceased sureties have not been so distributed that the obligation which they signed as sureties has ceased to be a lien upon the real estate bound by it.

The answer also denies the right of this Court to require it to file another bond under the facts.

In support of the first proposition the defendant argues through its counsel, "that there is an engagement here to indemnify what may at any time occur, and that this engagement extends to the representatives of the sureties." An endeaver is made to support this argument by several cited authorities. Those citations are not deemed applicable to the circumstances of the present case. They tend to establish the principle that where a person becomes a guarantor that a contractor or covenantor will perform a definite and well defined thing for consideration in a specified time, and fails in the performance of his promise, the surety or his estate may be held liable for the known and estimated amount of loss.

The case now being considered involves no past or present actual claim during the life of the bond nor does it involve any credit which could have been obtained because of the names on the bond as sureties. "Sureties are viewed with a favorable eye, both in law and equity. They should be held to the performance of what they clearly agree to do; but they ought not to be charged by strained construction, and on doubtful conjecture;" Weaver v. Shryock, 6 S. & R. 264.

That the sureties on the bond in question are all dead, and that the principal obligor is cognizant of that fact, is made plain to the Court by the admissions made in the answer filed in response to the averments contained in the relator's petition.

It is also plain that no liability under the bond now exists, for which the sureties could be held liable. From those obvious facts, and from an inspection of the bond itself, the contract mentioned in the bond is an executory one; and the liability is yet to arise which could hold any of the sureties on the bond or their estates liable. That the estates of the deceased sureties have been disposed of by actual distribution under legal process and by will, are matters of record of which this Court has official knowledg. We are, therefore, of the opinion that the liability of each of the deceased sureties on the bond was terminated by death; and the personal representatives or the estates of said deceased sureties could not be held under the present contract when viewed by the facts of this case; 32 Cyc. p. 85, pl. 6; Slagle & Co. v. Ambrose et al., Executors, 1 Mons. 30; Weaver v. Shryock, 6 S. & R. 262; Stoner v. Stroman, 9 W. & S. 85; United States v. Eli R. Price, 50 U. S. 82; Guy v. Ward et al., (Conn.) 34 Atl. 1025; Eben D. Jordan v. Elizabeth Dobbins, Admrs. (Mass.) 122 Mass. 168; Coulthart v. Clementson, (Eng.) V Queen's Bench 42.

The argument advanced in support of the second contention is, that under the 12th section of Article V of "the Public Service Company law," approved June 26, 1913, P. L. 1408, this Conrt has no jurisdiction to determine the present contention. That section reads as follows: Except in cases in which grade crossings are in process of abolition at the time of the passage of this Act, under agreement or contract with a municipality, as set forth in the proviso of section five of article three of this act, the commission shall have exclusive power to determine, order and prescribe, in accordance with plans and specifications to be approved by it, the just and reasonable manner, including the particular point of crossing, in which trakts or other facilities of any public service company may be constructed across the tracks or other facilities of any other public

service company at grade or above, or below grade, or at the same or different levels; or in which the tracks or other facilities of any railroad corporation or street railway corporation may be constructed across the tracks or other facilities of any other railroad corporation or street railway corporation, or across any public highway, at grade, or above or below grade; and to determine, order and prescribe the terms and conditions of installation and operation, maintenance and protection of all such crossings which may now or hereafter be constructed, including the stationing of watchman thereat, and the installation of lights, block or other system of signaling, safety appliances, devices, or such other means or instrumentalities as may to the Commission appear reasonable and necessary to the end, intent and purpose that accidents may be prevented and the safety of the public promoted. No such crossing shall be constructed without the approval of the commission, evidenced by its 'Certificate of Public Convenience,' as provided in section five of Article three of this Act; but in no case shall the approval or consent of any court, board, or other commission or officer, or of any municipality, be necessary therefore.

"It shall be proper, however, for the commission, by general rule or order, whenever the same can be properly regulated by suitable general rule, to prescribe the terms and conditions under which such crossing may be constructed, operated, maintained, or protected without the particular approval of the Commission." * * * *

The act (Sec. 12) also says the commission shall have exclusive power to order "any crossing aforesaid, now existing or hereafter constructed" * * * * "to be relocated or altered, or to be abolished," * * * *

The same section provides for "compensation for damages which the owners of adjacent property taken, injured, or destroyed, may sustain in the construction, relocation, alteration, or abolition of any such crossing specified in this section."

A diligent perusal of that section fails to sustain the respondent's contention.

The decree, upon which the relator's application is now made and is based upon was made August 30th, 1893. It is a mandatory order which issued out of a Court of Equity and has been in force ever since. It is reasonable to believe that it is such a condition as the legislature apprehended when it excepted from the operation of the act the abridgement or impairment of any of the obligations, duties or liabilities of any public service company in equity or under the existent common or statutory law of the commonwealth, when it provided in Section 29 of the same Article that "such obligations, duties, and liabilities shall be and remain as heretofore. "And * * * * nothing in this act contained shall in any way abridge or alter the existing rights of actions or remedies in equity or under the common or statutory law of the Commonwealth, it being the intention that the provisions of this Act shall be cumulative, and in addition to such rights of action and remedies;" P. L. 1419.

There is no request now to have any of the requirements of the decree made in this case abridged, or altered, and nothing is requested which would tend to change existing actions or remedies in equity; but we are only asked to do that, which in effect, would be an enforcement of the terms of the decree of the court of equity, made on the 30th of August, 1893. That there can be no lack of equity in this proceeding, is evidenced by the fact that a similar request was made by the defendant to this Court on the 1st day of March, 1909, and was granted without any objection by the plaintiff, when the bond with sureties as originally approved by the Court was changed by the substitution of the sureties who are now all dead and, as we have before observed, are no longer liable for the fulfilment of the terms of the decree.

It is deemed just and equitable. that the prayer of the petition be granted and therefore the rule granted is hereby made absolute.

C. P. Berks Co.

Beam v. Richard et al.

Promisory Notes—Suit by Executrix—Evidence—Competency.

Where an executrix accepts a promissory note made to her individually by a debtor of the estate, she may sue upon the note either individually or as executrix.

Where the subject of a suit is a promissory note given by defendant to an executrix in payment of a debt due the decedent, the testimony of the executrix is competent to show the consideration by stating what was said to her by the defendant at the time the note was given. The Act of 1887 does not apply, as the giving of the note was a transaction between the witness and the defendants, and not between the decedent and the defendants.

In such a case the testimony of the defendant that she was not indebted to the estate of the decedent is incompetent, since such testimony would relate to transactions between the witness and the decedent, and fall within the provisions of the Act of 1887.

Rule for new trial.

E. H. Deysher and *Earle I. Koch* for defendants and rule.

Silas H. Rothermel for plaintiff.

October 15, 1917. WAGNER, J.—This is an action brought by Elizabeth Beam, as executrix, against the defendants, upon a promissory note for $950, dated March 31, 1915, made payable to her individually. The statement avers that this note was given by defendants on account of a sum which was due and owing the decedent, Moses Beam, by the defendants at the time of his death for land conveyed and sold by him to Ella Richards, in her lifetime.

One of the reasons advanced at the trial as a defense to the suit and argued as a reason for a new trial, was that the note was made to the plaintiff in her individual capacity and not as an executrix of the estate of Moses Beam, deceased, and that therefore this action by her as personal representative could not be maintained.

It is plain from the pleadings in this case, together with the evidence thereon, that the fruits of a recovery on this promissory note will be assests of the estate of Moses Beam, deceased. In 18 Cyc. pp. 874, 875, we have this: "The rule seems to be well settled that if the fruits of the recovery will be assets the representative may declare either in his representative capacity or in his own name. This rule applies equally whether the action is on tort or contract, and whether the consideration flows from the decedent or the representative." The rule thus stated applies to actions on notes: see supra. In Boggs, administrator of Boggs v. Bard and others, executors of Johnson, 2 Rawle 102, it is held: "Where the debt to be recovered is assets, the plaintiff may name himself administrator, and sue as such on contract made by him;" see also Peries v. Aycinena, 3 W. & S. 64. This defense to the action cannot, therefore, be sustained.

Defendants assign as a reason for a new trial error in admission against defendants' objection, of the evidence of Elizabeth Beam as to the consideration of this note. On page 1, N. of T., counsel for plaintiff handed the note to the witness and asked her whether she recognized it. Upon her answering in the affimative, counsel for the defendants requested an offer. Whereupon counsel for plaintiff stated: "The note is admitted, but the purpose for which it was given is denied. I want to show the purpose for which the note was given; that is, the consideration. We offer to show that the considertion, $950, so expressed in the note, was given as the balance due on some purchase money for a farm situated in Caernarvon township, which the parties admit to have purchased, and for which a deed was given by Moses Beam." To this defendants objected, assigning a number of reasons, one of which was that "Moses Beam, one of the parties to the transaction, is dead, and therefore, the witness is incompetent," under Act of May 13, 1887, Sec. 5, (E), P. L. 159.

The giving of this note was a transaction between this witness and the defendants, and not between Moses Beam and the defendants. This witness was, therefore, competent to testify to that which, at the time of the giving of the note, was stated by them to be its consideration. The objection of counsel was to the offer to show the consideration, and not to the form of the question which followed the overruling of the objection to the offer. It was only when plaintiff's counsel (p. 2 N. of T.) asked the witness what conversation she had with Ella Richard that there was an objection to the question asked. This evidence was clearly admissible as showing admissions to the witness, the personal representative of the deceased, of indebtedness as bearing upon the consideration for which subsequently the note in question was given. Her testimony was that she and Ella Richard went to Mr. Friday's (an attorney) office to get a settlement from her (Ella Richard) of the balance due from her on the land conveyed by the decedent during his lifetime. That they were both agreed to have a note or mortgage drawn up for $1,000, that being about the amount agreed to be due. That if subsequently it was determined that this amount was more than the indebtedness, that then Mrs. Beam was to pay her the balance between the $1,000 for which the mortgage or note was given and the amount due. But if this note or mortgage for $1,000 was not sufficient to cover the indebtedness of the defendants, then the defendants were to pay to the witness the amount of the indebtedness which

was more than the amount of $1,000. That subsequently, upon the husband refusing to sign the papers which had been drawn up in Mr. Friday's office, Mrs. Richard figured up and determined the amount due, and that then the promissory note in question for $950 was delivered by defendants to this plaintiff. An examination of her evidence shows that it was limited to the transaction between the plaintiff and the defendants, and related to the consideration for which the note was given. It was, therefore, not incompetent under the Act of 1887.

Another matter alleged as error is that the Court sustained the objection to this question put to Mrs. Richard (N. of T., p. 29): "State whether or not you were indebted to your father's estate in the sum of $950 for real estate purchased from him?" That question as it stood related not to the occurrences of the time when this note was signed, but to transactions between the decedent and this witness as a defendant, and consequently was not admissible under said Act of 1887. Her evidence was excluded only as it bore upon the transactions between her and her father. When she was questioned as to what she had said in Mr. Friday's office with reference to an indebtedness to her father's estate there was no objection, and her evidence was admitted. She testified that she had not there said that she was indebted to her father's estate or that this note was given upon and in consequence of an indebtedness by her to her father's estate. She testified that the consideration for the note was farm stock received or to be received to the extent of $950 from the plaintiff individually, and that by reason of the return of the farm stock to plaintiff, the indebtedness represented by the note was wiped out. We do not consider that there was any error in excluding her evidence bearing upon the transaction between her and her father.

Reasons for new trial discharged.

QUARTER SESSIONS

Q. S. of Lehigh Co.

Roth's Petition

Detective—Proof Required—Act of May 23, 1887, P. L. 173.

Affirmative and convincing proof ought to be furnished to the Cour that the applicant for a detective license has the proper qualifications.

In re Petition of Clinton W. Roth for a license to conduct the business of a Detective.

Horace W. Schantz for Petitioner.

October 15, 1917. GROMAN, P. J.—Clinton W. Roth on September 5th, 1917, filed his application for a license to conduct the business of a detective under the provisions of the Act of May 23rd, 1887, P. L. 173. The Act provides that it shall and may be lawful for the Court of Quarter Sessions to issue a license upon payment of a fee of Twenty-five ($25.00) Dollars, for the use of the county; the license to extend for the period of three years; to be revocable at all times by the court upon cause shown; no license to be granted until satisfactory proof of competency and integrity of the petitioner be made to the court; and a bond in the sum of Two Thousand ($2,000) Dollars conditioned for the faithful and lawful performance of the duties of the appointment be given and executed by the petitioner. Under the terms of the bond any person injured or aggrieved by any unlawful act of the detective may bring suit thereon. The application was duly advertised as required by the provisions of the Act, and the matter came up for hearing on October 8th, 1917. From the testimony then submitted by the petitioner and now on file in this proceding it appears petitioner is a reputable citizen of Allentown, Pennsylvania, and a man of large family. He is at present employed as a flagman by the Philadelphia and Reading Railway Company, earning One Hundred ($100.00) Dollars per month, with opportunities for advancement. The assurance was given to the court by the petitioner that eventually he expected to retire from the railroad service, and give his entire time and attention to the duties of the business of a detective.

During the last October sessions of criminal court, a constable, who was also a detective licensed by this court, plead guilty to extortion, and was sentenced to pay a fine of Twenty-five ($25.00) Dollars, costs and

undergo imprisonment in the Lehigh county jail for the period of six months; imprisonment suspended. The court immediately issued a rule on the detective referred to to show cause why the license issued by this court should not be revoked. On October 8th last at a regular session of this court an application for a license was withdrawn by the petitioner who held a license for the last three years, after a number of witnesses were subpoenaed in opposition to the issuing of a license, and before hearing had. The court was thus led to investigate the construction laced on the Act by other courts in the tate. Judge Endlich, of Berks County, in Smith's Petition, 5 District Reports, Page 467, in an opinion filed January 20th, 1896, uses the following languag:: "The applicant for a new license, under the Act of 1887, ought to furnish affirmative and convincing proof (to be weighed in connection with the judge's personal knowledge and observation of the applicant; Raudenbusch's Petition, 120 Pa. 328, 342; Kelminski's License, 164 Pa. 231) that he is a person experienced in the essentials of the business he proposes to engage in, acquainted with the methods and habits of criminals, familiar with the privileges and duties of officers charged with their pursuit and arrest, possessed of the requisite courage, moderation, coolness and integrity to act judiciously and efficiently in trying situations, mindful of the rights of citizens and the extent and limitations of the powers of peace officers, and that he is a person of unblemished character, free from objectionable habits and degrading associations, above the suspicion of having been or becoming implicated in blackmailing schemes or the bringing of prosecutions for the purpose of settlement and extortion, discreet, honest, truthful and reliable. The licensing of such a person can be of no menace to the public. The licensing of any other sort can never be a public necessity, nor supposed to have been intended by the legislature. An applicant for the renewal of a detective's license ought to furnish similar proof that, during the term of his expiring license, he has come up to the above requirements, both affirmative and negative. His license has not made him an officer of the court, and the latter cannot, therefore, be presumed to have official knowledge of the facts concerning him. There is no provision in the statute for relicensing without inquiry. Every application is a new one as regards the necessity of proof of competency and integrity."

Judge Halsey, of Luzerne County, in Re Application of Fierro for a detective license, 12 Luzerne Legal Register Reports, Page 278, in an opinion filed May 6th, 1904, took the same view of the application for a license as heretofore expressed by Judge Endlich.

Judge Bregy, in the Court of Quarter Sessions of Philadelphia County, in Re Dickerson's Petition for a license as detective, 5 Lackawanna Jurist, Page 292, on January 8th, 1904, in an opinion therein filed, uses the following language: "It is true the certificate of citizens attached to the petition is intended to supply the requirement of the act, to furnish to the court "satisfactory proof of the competency and integrity" of the person applying. It is the court that is to be satisfied. The opinion of the others, as expressed by their signatures being to a paper, is not to me "satisfactory proof." In an opininion written by me in 1895 I expressed the same thought, in almost similar language. See Burnett's Application, 5 Dist. Reps. 3; also Smith's Petition, 5 Dist. Reps. 465. What was there decided is now reaffirmed."

The foregoing cited authorities indicate the construction placed upon the Act of 1887 by this court, and the practice to be followed in applications for a license for the purpose of conducting the business of a detective.

The testimony submitted in this application does not meet the requirements of the act so as to entitle the petitioner to a license. The testimony adduced is very creditable to the petitioner, but the proof does not go far enough.

Application denied.

Q. S. of Lancaster Co.

Com. v. Rodman

Maintenance for wife and child - When will be modified after divorce.

Rule to revoke decree for maintenance.

John A. Nauman, for rule.

B. F. Davis, contra.

September 22, 1917. LANDIS, P. J.— On July 29, 1917, the defendant was heard on a charge of desertion, and he was thereon sentenced to pay his wife, Eleanor Rodman, for the support of herself and her minor child, Mabel Rodman, the sum of three dollars per week. He now asserts that, on April 23, 1917, he was divorced in the Court of Common Pleas of this county from

the said Eleanor Rodman, and that his daughter was, in March last, fifteen years old, and has been employed in the Silk Mills of the Shehli Silk Mills Corporation, for which service she is receiving nine dollars per week. For these reasons, he asks for the revocation of the said decree. In an answer filed by Eleanor Rodman, all of the above allegations are admitted, except the one relating to the wages earned by the daughter. It is said that she is now employed by Follmer, Clogg & Company, and is paid from $3.00 to $3.50 per week. As no depositions have been taken, we must assume that this latter claim is correct.

Of course, the defendant is no longer liable for the maintenance of his late wife, a legal separation having been decreed between them. But he must support his child. As she is only earning from $3.00 to $3.50 per week, it is necessary for him to add to this amount for her proper maintenance. We think, as the order was made for the mother and child, he should be allowed something because of the divorce, and that the order should be reduced to $2.00 per week from this date, on condition that all the back money be paid. To this extent, we make this rule absolute.

Rule made absolute.

ORPHANS' COURT

O. C. of Schuylkill Co.

Smith's Estate

Error in Name of Decedent—Jurisdiction.

The register of wills has jurisdiction in all matters relating to letters which have been issued improvidently; error in the name of the decedent may be corrected by him.

Petition.

E. W. Shoemaker for Petition.

Nov. 12, 1917. WILHELM, P. J.—This petition sets out that James Edward Smith died on the 22nd day of August, 1917, and it can be inferred from the caption in the petition, notwithstanding there is no averment to that effect, that letters of administration were issued in said estate in the name of Joseph E. Smith. It is presumed that the name of Joseph E. Smith was represented to the register as being the name of the decedent.

The petition further states that the widow, Minnie Smith, renounced her right to administer in favor of Thomas H. Snyder, who filed his bond for the faithful performance of his duties as adminstrator.

It is also alleged that there was error in the first name of the decedent and that said error "was not known or discovered until after the appraisement of the estate had been made and filed of record."

The prayer of the petition is that an order issue directed to the register to correct the record to "conform to the true facts" therein set forth.

If this court had jurisdiction to grant the prayer of the petition without notice, as is proposed, several difficulties lie in the way. It is not disclosed what records are to be corrected. It is asserted that letters were issued by the register, a bond was filed by the petitioner and an inventory was made and filed. If a renunciation was filed and proof of death submitted these papers are probably on file, and neither copies of these papers, or any other papers, are attached to the petition so that it could be ascertained what corrections should be made in this record.

This application should have been made to the register, who has power to revoke letters improvidently issued, Neidig Estate, 183 Pa. 492.

Letters of administration are improvidently granted when the proofs of death were made in the name of a man who did not exist; that letters were granted in that name upon the petition of a woman who was not the widow of a man of that name.

While it is possible for error of this character to be corrected in record papers upon proof after proper notice, larger difficulties lie in the path of correcting the bond filed so that its value as a protection to the estate may not be impaired.

The petition is dismissed.

Gettel's Petition

Judicial Sales—Enforcement and Validity.

Respondent and decedent's administratrix agreed upon a private sale to the former of decedent's real estate; but, upon exceptions filed, the Court refused to confirm the sale and ordered a public sale, at which petitioner bought the property. The sale was duly confirmed and deed executed and delivered; but respondent, having entered into possession before the public sale, refused to vacate, whereupon, a petition was filed under the Act of April 20, 1905, P. L. 239, and citation was granted. HELD, that judgment must be entered against the respondent.

The facts plainly disclose that the petitioner is the owner of the real estate in question, having his title through an order and decree of the Orphans' Court, and from all the facts, he has a present right of the possession thereof.

Citation issued to Howard Bollinger, commanding him to appear and answer and show cause, if any he has, why possession of

certain real estate described in the petition, should not be delivered to the petitioner.

A. C. Wiest for petition.

E. E. Allen for respondent.

January 7, 1918. Ross, J.—This case was argued before the Court upon the petition of Frank M. Gettel, and the answer thereto of Howard Bollinger.

The admitted facts gathered from those pleadings are as follows:-

1. Jacob Bollinger, late of Shrewsbury Township, York County, Pennsylvania, died intestate, on the 23rd day of August, 1916, seized and possessed of certain real estate described by the petitioner in his petition.

2. On the 5th day of September, 1916, letters of administration were granted by the Register of Wills of said York County, to Rebecca Bollinger.

3. Subsequent to the granting of said letters of administration, there was an agreement made with Howard Bollinger, the present respondent, to sell to him the said real estate for the sum of $8100.00.

4. On the 12th day of February, 1917, said administratrix presented to this Court her petition showing, among other things, that the personal estate of said Jacob Bollinger, deceased, is insufficient to pay his debts, and the necessity for the sale of his real estate to pay the debts of said decedent, and praying the Court to authorize, decree and approve a private sale of the said real estate to Howard Bollinger for the sum of $8100.00, for the purpose of paying the debts of said decedent: thereupon the Court ordered that a private sale be authorized, decreed and approved, as prayed for, on Monday, March 12th, 1917, at 10 o'clock A. M., unless exceptions be filed and a substantially larger offer therefor be made at, or before that time.

5. In due time exceptions were filed and a substantially larger offer was made for the said real estate. After a hearing, on March 20th, 1917, the Court made an order and decree refusing to decree and confirm said private sale, and in accordance with the order of the Court, the exceptant and bidder secured his bid for the said real estate for $8500.00, and a public sale thereof was ordered by the Court on the 26th day of March, 1917, to be held within two hundred days from the said 20th of March, 1917

6. In accordance with the order of the Court, the said Administratrix advertised the said public sale of said real estate, and sold the same at said sale to Frank M. Gettel, for the price and sum of $8500.00, he being the highest and best bidder for said real estate; and upon return of said sale to this Court by said Administratrix on the 14th day of May, 1917, the Court confirmed the sale so returned, nisi, and at the time thereafter fixed by rule of court, the said confirmation became absolute.

8. Subsequently, the said administratrix executed and conveyed the said real estate by deed as administratrix and by virtue of said order, decree and confirmation of said sale, delivered said deed to the said Frank M. Gettel, upon his paying to her the said sum of $8500.00.

8. After the said Howard Bollinger had agreed to purchase the said real estate for the price or sum of $8100.00 and before said public sale, he entered upon said premises and tract of land and took possession thereof, and there remains and claims possession thereof, although he has had due notice of the legal proceedings in the Orphans' Court of York County, Pa., and of the sale and conveyance under and by virtue of said Orphans' Court proceedings of the said real estate to the said Frank M. Gettel.

The petitioner, in order to obtain his legal possession of the real estate so purchased by him at a judicial sale invokes the Act of General Assembly, entitled "An Act providing for and defending the rights, remedies, duties, and liabilities of purchasers of real estate at judicial sales, and of their grantees, heirs, and devisees thereof," approved the 20th day of April, 1905, P. L. 239.

It will be noticed by reference to the allegations in the answer, that the petitioner's averments are not controverted and that no material new matter is advanced by the answer, as replied to by the petitioner's replication, so that under the 8th and 9th sections of the Act of Assembly, no jury trial having been requested, the matter was properly before the Court on the pleadings; Spang v. Mattes, 253 Pa. 101.

The facts plainly disclose that the petitioner is the owner of the real estate in question, having his title through an order and decree of the Orphans' Court, and from all the facts, he has a present right of the possession thereof. Therefore, under the 12th section of the said Act of Assembly, the Court,

Enters judgment in favor of the petitioner, Frank M. Gettel, at the costs of Howard Bollinger, the respondent.

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COMMON PLEAS

Ruth v. I. O. R. M.

Practice-Act of 1915—Sufficiency of Statement.

Plaintiff's statement, in numbered parapraphs, set f orth that the contract was in writing; that plaintiff resided in York; that defendant was a beneficial association in York; decedent's membership and death; designation of plaintiff as beneficiary; authority for such designation: notice and proof of death and failure of payment by defendant. HELD, that a motion to strike off the statement as not in conformity with the Practice Act of 1915 must be refused.

Where the plaintiff's statement is uniform and clear, every defence whether of fact or of law, must be clearly set up in the affidavit of defence.

Allegations that the statement "presupposes and rebuts theories of the defence," and that to answer the statement would require the defendant "to divulge its entire defence, to answer matters that may not be material to the issue and to argue matters that are questions of evidence," are beyond comprehension and cannot be considered at this time.

No. 201, August Term, 1917.

Question of Law raised by Affidavit of Defense.

S. B. Meisenhelder and *A. W. Hermann* for motion.

K. W. Altland, contra.

January 7th, 1918. ROSS, J.—The statement in this case is intended to conform to the provisions of the "Practice Act, 1915."

The defendant in the affidavit of defense, says that it "does not conform to the provisions of the Act" in that,

1. It "is not in concise and summary form of the material facts on which the plaintiff rests her case." 2, That "it introduces apparently all the evidence of the plaintiff's case." 3, That it "contains conclusions of law." 5, That it "presupposes and rebuts theories of the defence." 6, That "if defendant is required to file an affidavit of defence in accordance with the * * Act, * * to the statement of claim as filed, * * * * * the defendant will be obliged to divulge its entire defence, to answer matters that may not be material to the issue in this case and to argue matters that are questions of evidence."

An inspection of the plaintiff's statement leads to the conclusion that it is a concise summary of the material facts relied upon by the plaintiff.

Those facts seem to be embodied in separate paragraphs which together form a chronological recital of the facts which the plaintiff is bound to prove at the trial, if the defendant denies them.

Each of the paragraphs can readily be denied or affirmed by the defendant. If denied, the plaintiff, of course, must produce proof at the trial; but they seem to be such plain allegations of fact, that the only inference to be drawn is that they are true, unless they are denied by the defendant as specifically as they are stated by the plaintiff.

It is our opinion, that the Act of 1915 means that where the plaintiff's statement is uniform and clear, every defence whether of fact or of law, must be clearly set up in the affidavit of defence.

The 1st, 2nd, 3rd, and 4th reasons raised by the defendant's affidavits are therefore dismissed.

The 5th and 6th reasons given by the defendant are beyond comprehension and therefore cannot be further considered at this time.

The prayer of the defendant's affidavit "to strike from the records the plaintiff's statement as not being in conformity with the "Practice Act, nineteen fifteen," is refused.

The defendant is ordered to file its affidavit of defence within fifteen days from this date.

C. P. of Allegheny Co.

Ayres et al. v. John Dunlap Co.

Workmen's Compensation—Minors—Action at Law—Liability of Employer—Child's Labor Act of May 13, 1915, P. L. 286.

One who employs a minor contrary to the Child's Labor Act of May 13, 1915, P. L. 286, is liable in damages for injuries to such employe in an action at law. Such an employe is not within the Workmen's Compensation Act of 1915.

The Workmen's Compensation Act of 1915, referring as it does to parties legally competent to contract, must not be construed as destructive of statutes enacted for the protection of employes of whom many are under legal disability, so that the Compensation Act does not deprive such employes of their rights at common law.

A statutory demurrer under the Practice Act of 1915 was overruled in an action for damages for injuries received by a minor while employed contrary to the Child's Labor Act of May 13, 1915, P. L. 286, in that such an employe was not within the provisions of the Workmen's Compensation Act, which does not vest minors with power to contract.

Statutory Demurrer.

E. T. Adair and *R. P. & M. R. Marshall*, for plaintiff.

Rose & Eichenauer and *James H. Gray*, for defendant.

January 7, 1918. CARPENTER, J.—The question of law raised by the affidavit of defense is—Does the Workmen's Compensation Act of 1915 preclude recovery of damages by the plaintiff's in a common law action?

The facts out of which the question arises, as set forth in the statement, are: Thomas Ayres, Jr., when a minor fifteen years of age, was employed by defendant and working as a helper on a press or stamping machine used in sheet metal manufacturing, and while so employed was seriously injured. The question never has been before our court and counsel state they have not found any decision in this State in which it has been discussed. Assuming, as we must, that plaintiffs' statement presents a cause of action at common law, the effect of the statute is, alone, before the Court. The Act defines certain words and phrases used therein. The power of the legislature, in this particular, is not questioned and is expressly recognized in McElhone v. Philadelphia Quartette Club, 53 Sup. Ct., 263, opinion by Judge Henderson, in which the court say:

"In the construction of a statue, words, if of common use, are to be taken in their natural, plain, obvious and ordinary significance. But it must be conceded that it is clearly within the power of the legislature to declare in the statute the sense in which it used certain words words therein contained, and that the legislature has an inherent right to prescribe the legality of its own definition or language. A construction put upon an act of the legislature by itself, by means of a provision embodied in the same, that it shall not be construed in a certain designated manner, is binding upon the courts, although the latter without such a direction would have understood the language to mean something different; Com. v. Curry, 4 Pa. Sup. Ct. 356; Getz v. Brubaker, 25 Pa. Sup. Ct. 303; 27 Cyc. 112."

In McNabb v. Clear Springs Water Co., 239 Pa. 502, the meaning of the word "establishment" as used in the Factory Act of 1905, was under discussion and Mr. Justice Elkins, speaking for the Court, said:

"After all, it is a question of legislative intention and since that intention was written into the very first section of the act in language broad enough to include the present case, a construction giving the act a more restricted meaning would make an arbitrary distinction not warranted by the language used."

I have quoted at length, that no misapprehension may exist as to the ground upon which my conclusion is based.

It is contended by counsel for defendant that inasmuch as the legislature has, in the Workmen's Compensation Act, defined the word "employe" the court is bound to adopt the definition, and if so, plaintiffs are precluded from maintaining this action. Section 104, so far as material to the present discussion, reads:

"The term 'employe' as used in this act is declared to be synonymous with servant and includes all natural persons who perform services for another for a valuable consideration," etc.

This is a comprehensive definition and if taken literally embraces minors under fourteen years of age whose employment "in and about or in connection with any establishment" is expressly prohibited by the Act of May 13, 1915 (P. L. 286), and minors under 16 years of age who, by Section 5 of the Act, are prohibited employment in operating or assisting in operating stamping machines used in sheet metal manufacturing. Section 8 of the same act provides that before any minor under the age of 16 years shall be employed, permitted or suffered to work in or about or in connection with any establishment or in any occupation, the person employing such minor shall procure and keep on file an employment certificate. In many States workmen's compensation laws have been enacted which in their general scope and purpose are similar to ours, but in a large number the words "lawfully employed," "legally permitted to work under the laws of the State, or qualifying phrases of similar import are used.

Having, at the same session (1915), enacted a law forbidding the employment of children under 14 years of age, and forbidding the employment of persons between the ages of 14 and 16 years in certain specified occupations and in others permitting their employment under certain restrictions, it is but reasonable to assume our legislators deemed it necessary to declare the Compensation Act applicable to persons "lawfully

employed." The Act of May 13th, supra, declares it unlawful to employ, (a) minors under the age of 14; (b) minors between the ages of 14 and 16 in certain occupations, and (c) in permitted occupations between said ages, without first obtaining an employment certificate. The logical conclusion from defendant's contention is, "the Workmen's Compensation Act applies to all employes regardless of age." If this condition is sustained it emasculates the Child Labor Act to which attention has just been called, by declaring lawful that which, at the same session, was made unlawful. Not only so, but in the face of positive prohibitions in one Act the Court is asked to hold that in the other the legislature intended to, and did in fact, impose an inhibited contract upon persons incapable of making any contract. For if the word "employe" includes, literally, "all natural persons" and one who is employed contrary to law is declared an employe within the meaning of the Compensation Act, a child under 14 years of age may make a valid contract of employment. A construction which leads to such results cannot be adopted. Nor can it be held that because Section 23 of the Child Labor Act provides a penalty for violation thereof, an employer is relieved from liability in damages; Stehle v. Jaeger Automatic Machine Co, 220 Pa. 617. This case came before the Supreme Court a second time, 225 Pa. 348, and the Court then said the father and son could recover damages.

It is held in Kelliher v. Brown & Co., 242 Pa. 499, that the provisions of the Factory Act of May 2, 1905, P. L. 352, requiring the owner to provide belt-shifters, is mandatory and in Valjaco v. Carnegie Steel Co., 226 Pa. 514, that the provisions of the same Act requiring that machinery be safeguarded cannot be impliedly waived, Mr. Justice Porter saying:

"In Pennsylvania we are committed to the view that the requirements of a statute adopted in the exercise of the police powers of the State for the protection of its citizens cannot be impliedly waived by the parties to the contract of employment."

This statement of the law is adopted by the Superior Court in Hrabchak v. D. & H. Co., 54 Sup. Ct. 626, in which Rice, P. J., after quoting the above adds: "Particularly is this true of statutory provisions intended for the protection of children." In Krutlies v. Bulls Head Coal Co., 249 Pa. 162, Mr. Justice Moschzisker quotes at length from Hrabchak v. D. &. H. Co., and says that where compliance with the Act (1915) is possible it is the only justification which the law will accept. In Jones v. American Caramel Co., 225 Pa. 644, Mr. Justice Brown says:

"The legislative mandate is that machinery of every description shall be properly guarded, and customary disregard of this is but customary negligence rendering everyone guilty of it responsible for the consequences resulting directly and solely from it."

The several Acts relating to the general question herein discussed are either mandatory or inhibitory or both. Three parties are interested in and affected by these statutes—the employer, the employe, and the State; and the Compensation Act, referring as it does, to parties legally competent to contract, must not be construed as destructive of statutes enacted for the protection of employes of whom many are under legal disability.

The State is vitally interested in the physical, mental and moral welfare of its children and has from time to time enacted laws for their protection. These laws are the garnered fruits of experience. An eminent educator has said: "No social conscience ever was or can be static. The almost unanimous testimony of human experience shows that the lawmaker does not precede but follows the developing social conscience. What the law-giver enacts into formal precept or law must previously have proved its worth in the collective experience." Keeping in mind the trend of legislation relating to child labor, the conclusion is, it seems to me, irresistable that our legislature, notwithstanding the comprehensive terms used in defining "employe," had in mind such persons only as are by law capable to make valid agreements. The language employed in Sections 301 and 302 sustains this view. Section 301 refers to employer and employe who shall by "agreement" accept the provisions of Article 3, and Section 302, says:

"In every contract of hiring * * * express or implied * * * it shall be conclusively presumed that the parties have accepted the provisions of article three of this act and have 'agreed' to be bound thereby, unless there be at the time of the making, renewal or extension of such 'contract' an express statement in writing from either party to the other that the provisions of article three of the act do not apply."

The act does not vest in minors power to contract. Whether it applies to persons over 16 years of age is not the question. The question is: Does it protect from suit at common law an employer who engages the services of a minor contrary to law? To this question alone the arguments of counsel were directed and other and important questions which might have been raised were not considered. Keeping in view the manifest purpose in enacting laws relating to and directly affecting employer and employe, and especially the purpose to safeguard children under 16 years of age, the irresistable conclusion is, the words "all natural persons" as used in Article 1, Section 104, of the Workmen's Compensation Act must be construed with reference to, and as affected by, the statutes relating to the employment of minors. Attention has been directed to the phraseology of workmen's compensation acts in other States and to decisions of the Supreme Courts of West Virginia and New Jersey, whose statutes are quite similar to our own, insofar as they relate to the question now being discussed. In Rhoades v. Coal Co., 90 S. E. Rep. 796, the Supreme Court of West Virginia held that a minor over 14 and under 16 years of age could not maintain a common law action but must proceed under the Compensation Act. In Hetzel v. Wessen Piston Ring Co, 98 Atl. Rep. 306, the Court of Errors and Appeals of New Jersey held that a minor employed in violation of the Factory Act might claim damages at common law.

I have not undertaken to analyze or weigh these conflicting opinions, the views which I have expressed being the result of our own act and the decisions of our Appellate Courts, which I think clearly indicate the general principles of law involved and the rules by which the statute in question should be construed.

Being of opinion that the Workmen's Compensation Act does not preclude plaintiffs, the affidavit of defense is adjudged insufficient. Defendant may, within fifteen days, file a supplemental affidavit, sec leg.

C. P. of Lackawanna Co

Siglin et al. v. Armour & Co.

Workmen's Compensation Law—Employe riding running board of motor truck.

One employed as helper to the driver of a delivery motor truck suffered an injury while riding on the running board after giving up his seat—which proved to be a place of safety—to some girls overtaken *en route:* HELD, that while he might have been guilty of contributory negligence he was not at the time outside "the course of his employment," and therefore not barred from relief under the Compensation Law.

Appeal by defendant from judgment of the Workmen's Compensation Board.

Scragg, Scragg & Scragg, for Plaintiff.

Warren, Knapp, O'Malley & Hill for Defendant.

November 5, 1917. NEWCOMB, J.—The Referee awarded compensation to the widow and children of one Harry Siglin who came to his death by accident while in defendant's employ. The award was affirmed by the Board of Compensation and from that defendant takes this appeal. Deceased was fatally hurt by a fall from his employer's motor truck, on its return from an out-of-town delivery of goods, in charge of a driver to whom deceased was a helper. He was standing on the running board, or at least with one foot on the board, and was thrown off by a jolt occasioned by an obstruction in the road. The driver and two girls on the seat were not disturbed by the jolt. Deceased had voluntarily given up his seat and taken to the running board, in order to give the girls a ride when they were overtaken on the road. That circumstance gives rise to the question raised by appellant, viz.: whether deceased was at that particular time in the course of his employment, to which some color is lent by the fact that of his own volition he had stopped the car, given up what proved to be a place of safety and taken one obviously of less safety, not in furtherance of the master's business but to help the girls on the way home from their work.

Appeallant takes the negative and its contention is supported by a very able argument; but the impression remains that it only convicts deceased of contributory negligence which can avail nothing in cases of this kind. Had he suffered an injury while on the ground for the purpose of taking on the passengers, a different question would be presented. But having resumed his appointed journey, he was no doubt in the course of his employment thereafter, no matter in what part of the truck he placed himself. The finding of the Referee having been affirmed by the Board, the burden must be on the appellant to clearly establish the alleged error, and of that we are not convinced.

The appeal is accordingly dismissed.

Vandersloot v. Pennsylvania Water & Power Co. No. 2.

Equity—Jurisdiction—Service out of County.

Plaintiff presented his petition, alleging that while the the lands, tenements and hereditaments concerning which suit was brought are located in York County, the defendant corporation had no office or place of business in actual operation in said county; but averred that defendant's busines offices were in New York City, and that it had a place of business in Lancaster County, and further prayed that service might be made at those places. The petition was granted and service made, whereupon defendant moved to have it set aside. HELD, that the motion must be granted.

The bill makes it plain that the defendant was lawfully incorporated under the laws of the State of Pennsylvania; if it has not properly or legally pursued its franchise as conveyed to it by the act of incorporation there exists some remedy at law; either by ejectment proceedings, or otherwise, according to the irregular or illegal encroachment.

It is quite plain from a perusal of the amended bill that the ultimate object of the plaintiff is to have this Court make an order which in effect would be to change the purpose for which the dam was constructed, presumably in accordance with its corporate rights.

As only a small portion of the dam is in this county the Court has no authority to direct service of process upon a non-resident.

No. 1, October Term, 1916.

Motion of defendant to set aside and vacate order of service and service of amended bill.

For the questions of fact and law involved in this case, see Vandersloot v. Pennsylvania Water & Power Co., 30 YORK LEGAL RECORD 189.

The Court, ROSS, J., having refused to set aside the service, an appeal was taken and the decree of the court below was reversed; Pennsylvania Water & Power Co.'s Appeal, 31 YORK LEGAL RECORD 41.

Plaintiff then filed an amended bill, confining his allegations of damages entirely to those sustained by lands and tenements in York County, and asking for an order of service on the corporation defendant at its offices in New York City and its plant in Lancaster County, which order was granted and service made.

Defendant moved to have the order and service set aside.

John E Malone and *Stewart & Gerber* for rule.

Niles & Neff, contra.

February 4th, 1918. ROSS, J.—On the 15th day of October, 1917, the above named plaintiff filed the following petition:

"TO THE HONORABLE, THE JUDGES OF SAID COURT:

"The petition of John Edward Vandersloot, the above named Plaintiff, respectfully represents:

On September 13, 1916, he filed his bill in the above entitled suit, together with a petition for an order of service, whereupon your Honorable Court ordered and decreed that service of the Bill be made upon the Pennsylvania Water & Power Company in the manner directed by the Act of April 6, 1859.

On, to wit, September 18, and September 29th, 1916, returns of service were made and filed.

On, to wit, September 28, 1916, John E. Malone and Stewart and Gerber, Esqrs., appeared in your Honorable Court for the Pennsylvania Water & Power Company, Defendant, *de bene esse*, as per paper filed.

On, to wit, October 16, 1916, the said solicitors for Defendant moved to vacate the order of Court and set aside service of the bill filed.

On, to wit, February 12, 1917, the said motion was refused in an opinion filed by the Honorable N. Sargent Ross, Judge.

On March 7, 1917, a decree was entered by your Honorable Court refusing to vacate or annul the order of service, and requiring the Defendant to answer Plaintiff's Bill in thirty days or decree *pro confesso*.

On, to wit, March 21, 1917, exception of the Defendant to the decree of March 7, 1917, was dismissed.

On, to wit, April 7, 1917, an appeal was taken to the Supreme Court on behalf of the Defendant from the said decree of the Court entered March 21, 1917, dismissing rule to set aside order of service and return of service and manner of service.

The said appeal in the Supreme Court was to No. 132 January Term, 1917, and was decided on, to wit, June 30, 1917, in an opinion by Moschzisker, Justice; in which the order of the Court below was reversed and said service of the Bill set aside. The reason for the said judgment of the Supreme Court is summarized in the said opinion as follows:

"In the case at bar it will be observed that the prayers for relief are not confined to property alleged to be within the jurisdiction of the Court; but, on the contrary,

they comprehend relief affecting the entire dam of the Defendant extending into the river beyond the limits of York County, and also relief which, if granted, would require a decree against the Defendant personally. On this state of facts under the authorities just cited, the present is not a case for service in accordance with the Act of 1859, supra; and the Court below erred when it determined otherwise."

Your petitioner, the Plaintiff in the above entitled suit, asks leave to file an amended Bill, herewith offered, in which all prayers are omitted and eliminated which are not confined to property alleged to be within the jurisdiction of this Court, and all relief which would require a decree against the Defendant personally.

In the said amended Bill offered to be filed, reference to acts of the Defendant in Lancaster County is only by way of necessary narrative and description, and to make the acts and things within the County of York, regarding which acts and things said County of York the said amended Bill and the relief prayed for are exclusively confined.

Your petitioner further showing that the acts of the Defendant, in York County, as alleged in the said amended Bill, are in increase and aggravation of the trespass upon his property in York County caused by raising of the height of that portion of Defendant's dam which is in York County by the erection of flash boards, whereby the crest of the Defendant's dam in York County is raised, and the damage to Plaintiff's property in York County is increased; which acts and additional trespasses have been by the Defendant done since the filing of the said original Bill.

Your petitioner further showing that the amended Bill offered shows substantial cause for the relief prayed for, that no answer has been filed to the original Bill, and that in accordance with the Supreme Court Rules, to wit, Rule 48, and the Law of Pennsylvania, to wit, Section 2 of the Act of May 4, 1864, P. L. 775, he is entitled to the permission prayed for in this petition..

Your petitioner further presents with the said amended Bill his petitition for an order that service of the amended Bill in this case be made upon the Defendant in the manner directed by the Act of April 6, 1859, and praying that the proper order upon said petition in accordance with the provision of the said Act be made by your Honorable Court.

And he will ever pray.

JOHN EDWARD VANDERSLOOT."

The amended bill was allowed by the Court to be filed. At the same time the following petition, affidavit and consequent order were filed:

"To the Honorable the Judges of the said Court:

"John Edward Vandersloot, the plaintiff in the above entitled suit, being duly sworn, says, that the suit instituted in the said Court is concerning lands, tenements and hereditaments situate and being within the jurisdiction of the said Court, to wit, in the Township of Lower Chanceford, York County, Pennsylvania.

That the Pennsylvania Water and Power Company, the defendant, is a Pennsylvania corporation, with its business offices and its general officers at 24 Exchange Place, New York City.

That the said defendant corporation has no office or place of business in actual operation in the County of York, which is the County in which the cause of action arose, and no member of its Board of Directors or other officer, is a resident of the County in which the cause of action arose.

That the defendant corporation has a place of business in Lancaster County, Pennsylvania, at Holtwood, where its power house and a place of business, is located.

Plaintiff prays your Honorable Court to order and direct that the Amended Bill filed in the said suit this day in the said Court, together with the notice to appear and file answer, secundum regulum, be served upon the said defendant, out of the jurisdiction of the said Court, wherever it or its officers may be found, as in such cases made and provided according to law.

JOHN EDWARD VANDERSLOOT."

Sworn and Subscribed to before me this 15th day of October, 1917.

(Seal of (Notary Public)) Charles A. May, Notary Public

My commission expires Feb. 27, 1921.

"And now, to wit, October 15th, 1917, upon motion of Niles & Neff, Solicitors for the Plaintiff in the above entitled suit, it is ordered and decreed that service of the Amended Bill in this case be made upon the said Pennsylvania Water and Power Company, the defendant, in the manner directed by the Act of April 6, 1859, and that said Defendant cause an appearence to be entered for it in the Prothonotary's Office of York

County, Penna. within 15 days after service of the said Amended Bill, and file its answer within 30 days after the said service of the said Amended Bill upon it; and that a certified copy of this order be also served upon it, with a copy of the Plaintiff's Amended Bill, agreeable to the said Act of Assembly.

By the Court, N. SARGENT ROSS, Judge.

The service and service of amended bill having been made and the returns of the Sheriff having been duly filed, the following motion was presented to the Court on the 30th day of October, 1917:

"To the Honorable, the Judges of said Court:

"The Pennsylvania Water and Power Company, the above named respondent, by its Solicitors, John E. Malone, Esq, and Stewart & Gerber, Esqs., respectfully move the Court to vacate and annul the order of service made October 15, 1917, ordering and directing service of the bill filed in this case upon the defendant in the manner directed by the Act of April 6, 1859.

And also to set aside the order to appear within fifteen days after the service of the bill and to answer within thirty days after the service thereof; and also to set aside the service of said bill made by the Sheriff of York County upon Charles E. F. Clarke, President and Treasurer of the Pennsylvania Water and Power Company, at the office of the Pennsylvania Water and Power Company, at 24 Exchange Place, New York City, on the 18th day of October, 1917; and also set aside the service of the bill made by C. S. Garber, Sheriff of Lancaster County under a deputization from William D. Haas, Sheriff of York County, upon F C. Stabley, the alleged agent of the defendant and the person for the time being in charge of the office and place of business of the respondent, the Pennsylvania Water and Power Company, at Holtwood, Lancaster County, Pa., on the 18th day of October, 1917. For the following reasons:

1st. There is no lawful power or authority vested in the Judges of the said Court to direct the service of its process outside of the State of Pennsylvania under the Act of April 6, 1859, and the service of the said bill as made upon Charles E. F. Clarke, President and Treasurer of the Company, at 24 Exchange Place, New York City, is invalid.

2nd. That there is no legal authority in the Sheriff of York County to deputize the Sheriff of Lancaster County to serve a bill in equity in the manner shown by the Sheriff's return.

3rd. That no proper or legal service is shown by the Sheriff's return upon the respondent company or any of its officers.

John E. Malone,
Stewart & Gerber,
Solicitors for Respondents."

A rule was immediately granted directing the plaintiff to show cause, if any he had, why that motion should not be allowed. The rule was returnable to the first Monday of December, 1917.

The plaintiff duly filed an answer by which he insisted that the services asked to bd set aside, were valid.

The contention was subsequently argued on petition and answer.

A careful examination of the amended bill and the prayers based thereon, leads to the conclusion that the present contention is controlled by the ruling of the Supreme Court (Vandersloot v. Pa. W. & P. Co., 259 Pa. 104). The prayers, are so drafted that the Court is asked to make such orders and decrees as would only pertain to the physical construction of the dam which exists in York County, yet it is quite obvious that any such order or decree would necessarily affect the entire dam of the dedefendant, the largest portion of which, is outside the jurisdiction of the Court.

The first prayer is as follows:

"That this Court examine, inquire and ascertain whether the defendant does in fact possess the right of francise to do the acts within the County of York from which the alleged injury to the plaintiff's private rights results within the County of York," &c., &c. The bill makes it plain that the defendant was lawfully incorporated under the laws of the State of Pennsylvania; if it has not properly or legally pursued its franchise as conveyed to it by the act of incorporation there exists some remedy at law; either by ejectment proceedings, or otherwise, according to the irregular or illegal encroachment; but for the purposes of the present inquiry we must assume that it has legally pursued its rights as they exist under the franchise which the charter gave to it. If the prayer is to be construed to mean that the plaintiff wants discovery and account against the defendant, then under the decision in Wallace v. United Electric Company, et al., 211 Pa. 473, the service should be set aside.

It is quite plain from a perusal of the amended bill that the ultimate object of the plaintiff is to have this Court make an order

which in effect would be to change the purpose for which the dam was constructed, presumably in accordance with its corporate rights. As was said by Mr. Justice Stewart in rendering an opinion of the Supreme Court in the case of Miller v. Cockins, 239 Pa. 566, "It is not to be questioned, * * * where there is nothing to give jurisdiction other than the fact that *some* of the property is within the jurisdiction of the court, and the prayer is for a decree against the defendant personally, the Court has no authority to direct service of process upon a non-resident." The prayers in the amended bill now under consideration, when taken in connections with the recitals in the bill, are well described by the language of Mr. Justice Moschzicker, in Vandersloot v. Pa. W. & P. Co., 259 Pa. 104, "they comprehend relief affecting the entire dam of the defendant; extending into the river beyond the limits of York County, and also relief which, if granted, would require a decree against the defendant personally."

We are of the opinion that the amended bill does not change the facts as they appeared in that case. The present is not a case for service in accordance with the Act of April 6, 1859, P. L. 387. Therefore, the motion made by the defendant must prevail.

The rule granted in this case is made absolute.

C. P. of Lancaster Co.

Ryder v. Jenkins

Bill of sale as collateral—Possession—Chattel mortgage—Creditors of vendor.

Where the maker of a promissory note gives as collateral security a bill of sale for two automobiles which are leased back to him and remain in his possession, the transaction is in effect a chattel mortgage without possession and void against creditors of the mortgagor.

Rules for a new trial and for judgment for plaintiff *n. o. v.*

B. C. Atlee and *B. F. Davis* for rules.

Chas. W. Eaby, contra.

January 5, 1918. HASSLER, J.—The question raised in the reasons for a new trial in this case is the same that must be passed on in disposing of the rule for judgment *non obstante veredicto*, so that we will consider both rules together.

This issue was framed to try the title to two automobiles, which were levied upon as the property of John W. Kelchner, by virtue of an execution issued by D. J. Jenkins, the defendant, and which were claimed by the plaintiff.

It appeared at the trial that on July 13, 1916, J. W. Kelchner signed and delivered a paper, called in it a bill of sale, in which for the consideration of $1,000, the receipt of which he acknowledged, he "does by these presents bargain, sell, transfer, and deliver" unto Louis E. Ryder, the plaintiff, two automobiles particularly described "to have and to hold the said cars, or automobiles, unto the party of the second part, its successors and assigns, as collateral security for payment of the promissory note for $1,000 given by the party of the first part to the party of the second part on July 13, 1916." The plaintiff thereupon on the same day executed a lease for the said automobiles to said John W. Kelchner for the term of four months at the rental of $1.00, with the privilege of purchasing the same for $1,000; the same to be returned to the lessor, at the expiration of the lease, if the option to purchase has not been exercised during the term. In this lease the bill of sale is referred to as having been executed as collateral security for the payment of the note for $1,000 which plaintiff had endorsed.

The automobiles did not reach Lancaster until some days after the above papers were executed. The testimony was conflicting as to whom they were delivered to and who retained possession of them until they were levied on by the sheriff. This question was submitted to the jury, who found that they were delivered to and remained in the possession of John W. Kelchner, and that they never were in the possession of the plaintiff, so that for the purpose of disposing of these rules we must consider that as a fact.

The alleged bill of sale is a chattel mortgage of the automobiles. They were pledged by Kelchner to the plaintiff as collateral security for his endorsement of the $1,000 note. That chattel mortgages, or pledges of personalty, without delivery of possession, are not valid in this state except as to certain property, which does not include automobiles, as against the owner's creditors, is well settled. In Bismark Building & Loan Association v. Bolster, 92 Pa. 123, Judge Trunkey says, "A mortgage of personal property in some respects is like a pawn or pledge. Without delivery of possession to the mortgagee, it is a nullity as to creditors, unless made under some statute; but if possession be given, the mortgagee may hold it until his debt is satisfied." In Barlow v. Fox, 203 Pa. 114, where the owners of personal property gave a bill of sale to a

t trustee acting for a bank to secure the bank for money advanced on their note, and the trustee leased the property to the original owners who obtained possession of it, it was held that a bill of sale was invalid as to creditors of the owner of the property. In delivering the opinion of the Court, Justice Fell says: "When by the action of the parties there has been a separation of the title and possession of personal property, courts will scrutinize the transaction to determine the real intention, and but little regard will be given to the form which it has taken or the name by which it is called. The law is liberal in not requiring an actual change of possession when it will defeat the lawful purpose of the parties. But there has been no deviation from the general rule that delivery of possession is indispensable to transfer a title, by the act of the owner, that shall be valid against creditors. In Clow v. Woods, 5 S. & R. 275, which is said by Judge Sharswood in McKibbin v. Martin, 64 Pa. 352, to be 'the magna charta of our law on the subject', it was decided that there is no difference in the application of the rule between absolute sales and contingent sales or mortgages, and that as to both the retention of possession when actual delivery is practicable, is a fraud in law. In Jenkins v. Eichelberger, 4 Watts 121, Gibson, C. J., said: 'To tolerate a lien severed from the possession by any device whatever, would be pregnant with all the mischiefs of colorable ownership; and to sanction it at the expense of the community could be justified but by the accomplishment of more important objects than individual accommodation.' These decisions have been followed in numerous cases which it is needless to cite. In a review of the cases in this state by the American editors of 1 Smith's Leading Cases, p. 78, it is said: 'That mortgages are within the rule has been expressly decided; and it is now established in Pennsylvania, as a general principle of law, that by no device whatever, whether of sale and agreement of resale, or by the title at the time of the purchase being vested in one who is a surety for the purchaser who takes possession, can a lien be created on personal property separate from the possession of it. The delivery must be actual and not merely symbolical where actual delivery is practicable, and if it is not practicable the parties should leave nothing undone to secure the public from deception.

Applying these cases to the facts in the present case, we must conclude that the plaintiff had no title to the automobiles in question as against the creditors of John W. Kelchner, and must, therefore, discharge both rules. The rule for judgment *non obstante veredicto* and the rule for a new trial are both discharged.

Kohr v. Fox Baking Co.

Practice — Statement — Specific Averments.

Plaintiff's statement alleged damages caused by his wife swallowing a pin contained in bread manufactured, sold and delivered to her. The defendant moved to strike off the statement because it failed to give the date of delivery of the bread or the swallowing of the pin, or the value of the wife's services, nor did it allege any negligence on the part of defendant or its employes, or specify any act from which negligence could be inferred. HELD, that the rule must be made absolute.

The defendant is entitled to a sufficiently specific averment of the material facts of the case, so as to enable it to understand the real nature and extent of the plaintiff's claim.

It is the apparent purpose of the "Practice Act of 1915" to require that the material facts intended to be proven and relied upon by either party at the trial of the case, shall be specifically set forth on the face of their respective pleadings, and that both parties shall thereafter be restricted thereto, and it is the duty of the Court to see that its provisions are literally and fully complied with.

Absence of allegations of negligence on the part of the defendant or its employees, or no averment of specific facts from which such negligence could be inferred, if presented in an affidavit of defense, might result in a judgment for the defendant, but they cannot be finally ruled upon on a motion to strike off the statement.

No. 6, April Term, 1918.

Rule to show cause why Plaintiff's statement should not be stricken from the record.

Niles & Neff for rule.

Stewart & Gerber, contra.

February 4, 1918. WANNER, P. J.— This is a rule to show cause why the plaintiff's statement should not be stricken off for non-compliance with the provisions of Sec. 6 of the "Practice Act of 1915" P. L. 483, which requires that the material facts

upon which the plaintiff's claim is based shall be set forth in the statement in a concise and summary form. The rules of this Court also provide that the plaintiff's statement "shall contain a specific averment of the facts necessary to constitute a good cause of action."

This is an action of trespass brought by Jesse Kohr and Lizzie Kohr, his wife, to recover damages for injuries resulting to the latter from swallowing a pin, contained in bread which the defendant had sold and delivered to the plaintiff.

The defendant's objections to the plaintiff's statement are, that it fails to give the dates of the delivery of this bread to the plaintiff, or of the swallowing of the pin by the plaintiff's wife, neither does it give the value of the wife's services by the week, month, or otherwise, for the loss of which damages are claimed, nor does it allege that any negligence on the part of the defendant or any of its employees, caused the injury to plaintiff's wife, or specify an act of defendant from which negligence could be inferred.

These are material facts, proof of which at the trial of the case, will be necessary to a recovery by the plaintiff, and the defendant is entitled to a sufficiently specific averment of the same to enable it to understand the real nature and extent of the plaintiff's claim. They should, therefore, have been set forth with reasonable certainty in the statement. As no excuse for their omission is contained in the statement itself, and no answer has been filed to this rule, denying the plaintiff's ability to set them forth therein, the statement must be held defective without them, under the provisions of the Practice Act of 1915, and the rules of this Court.

The defendant alleges that it had many employees engaged in the making and delivery of bread at the time of the sale and delivery of the bread in question in this case, and that unless more accurate dates, and more specific averments of fact are given, an affidavit of defense cannot be framed, or an intelligent defense made to the plaintiff's claim.

The defendant's objections that the statement contains no allegation that the negligence of the defendant or its employees caused the injury to plaintiff's wife complained of, and that no specific act of the defendant is alleged from which negligence could be inferred, also raise the question whether or not the plaintiff's statement shows a good cause of action. If those objections had been presented in an affidavit of defense and sustained by the Court, they might have resulted in a judgment for the defendant, under the provisions of Sec. 20, of the "Practice Act of 1915." But they cannot be finally ruled upon by the Court on this motion to strike off the statement, which does not really raise the question whether or not the plaintiff's cause of action is a good one, but only whether it is set forth in the statement with the particularity required by the "Practice Act of 1915" and the rules of this Court; Barto v. Shaffner, 26 Dist. Rep. 97; Ehrenstrom v. Hess, No. 1, 26 Dist. Rep. 992.

As already seen, the Practice Act has not been sufficiently complied with in the averments of material facts essential to a recovery by the plaintiff, and to a proper understanding of the details of the plaintiff's claim by the defendant.

It is the apparent purpose of the "Practice Act of 1915" to require that the material facts intended to be proven and relied upon by either party at the trial of the case, shall be specifically set forth on the face of their respective pleadings, and that both parties shall thereafter be restricted thereto, and it is the duty of the Court to see that its provisions are literally and fully complied with.

The rule to show cause is made absolute. The plaintiff's statement is stricken from the record, with leave, however, to file another statement in proper statutory form within ten days after the filing of this decree.

C. P. of Northampton Co.

McLaughlin v. Lehigh Valley Railroad Company

Compensation — Appeal — Liability under Federal or State Liability Acts—Burden of proof.

1. In an appeal from the Workmen's Compensation Board where the only defense is that the Federal Employers' Liability Act governs the case to the exclusion of the State Compensation Act, the burden is upon the defendant to prove the facts necessary to show that the decedent was engaged in interstate commerce at the time of the accident.

2. Where the last duty in which a railroad yard employee was seen to be engaged prior to

his death was upon a car, the entire journey of which was intrastate, the fact that the car was being attached to a train which had come from a point outside of the state, but which was bound to a point within the state, does not establish that the decedent was "engaged in interstate commerce" at the time of the accident.

Sur appeal from decision of Workmen's (Pa.) Compensation Board.

W. H. Kirkpatrick and *D. H. Wilson*, for the claimant.

E. J. & J. W. Fox, for defendants.

January 14, 1918. McKeen, J.—This is an appeal from the decision of the Workmen's Compensation Board affirming award granted by the referee and dismissing the appeal taken by the defendant. John McLaughlin, the husband of claimant, was a member of a yard crew in the employ of the Lehigh Valley Railroad Company, working in the yard at South Bethlehem, Pennsylvania. His duties were to throw switches, shift and couple cars in accordance with instructions. At South Bethlehem the line of the Philadelphia and Reading Railroad Company from Philadelphia connects with the main line of the Lehigh Valley Railroad Company, originating at Jersey City, New Jersey, and going to Wilkesbarre, Pennsylvania and points west. Immediately prior to the accident the yard crew, of which McLaughlin was a member, went to the Philadelphia and Reading Tracks and transferred two passenger cars from a train on the Philadelphia and Reading tracks, which had originated at Philadelphia, one to a local train, originating at Bethlehem, the other to a through train, also on the Lehigh Valley tracks which had come through from Jersey City, New Jersey. After this through train (No. 29) had proceeded the switching engine was backed into the yard for some repairs to be made upon the engine. Subsequent to these operations an east bound train on the tracks of the Lehigh Valley went through and shortly afterward McLaughlin was found dead near the track on which this train passed, presumably having been killed by the east bound train. McLaughlin was last seen alive about fifteen or twenty minutes before the accident. At that time he was uncoupling the switching engine from the passenger car which he had just attached to the through train from Jersey City. The passenger car which he attached to the through train was an intrastate car routed to an intrastate point. The only question for the determination of the court is: Was the decedent engaged in interstate commerce at the time of injury? The contention of the appellant is that as this train, which was partly made up in South Bethlehem, was engaged in interstate commerce and McLaughlin was assisting in the make up of that train, he was, therefore, engaged in interstate commerce and subject to the federal law and not to the state law. The test, as laid down by the authorities, of employment in interstate commerce, is whether the employe when injured was engaged in interstate transportation, or in work so closely related to it as to be practically a part of it. Appellant urges that the case at bar is very similar to the case of Erie Railroad Company v. Winfield, 244 U. S. 170, and that the court should hold that the jurisdiction of the United States court would obtain and not the jurisdiction of the state compensation board. In the Winfield case, a brakeman was engaged in a yard which handled both interstate and intrastate commerce, and after he had completed his work for the day was crossing the tracks in the yard to go home. He was struck by a train and the court held that the Federal statute applied and that it was not a proper case for the state compensation law. The case at bar, however, differs from the Winfield case in this, the decedent had completed an intrastate act and presumably was at the time he was killed on his way back to the place of his employment to engage in other duties the nature of which is not disclosed by the evidence. The burden of proof is upon the appellant to establish the fact that the decedent was engaged in interstate commerce at the time of the injury. In Hench v. Penn. R. R. Co., 546 Pa. St. 9, Mr. Justice Elkin held: "If the mere fact that a railroad may be used at times, frequently or otherwise, for interstate commerce transportation, fixes the status of all its employes as being engaged in interstate commerce within the meaning of the acts of congress, without reference to the duties they were performing at the time of the injury, it would follow that all such employees no matter how incidentally or remotely their duties had to do with interstate commerce generally, or what kind of commerce they were engaged in when injured, would come within the purview of the Federal statutes when they brought an action to recover damages for personal injuries. To

so hold, would mean the wiping out of all state regulation and authority in matters relating to the personal injuries of railroad employees. The cases have not gone so far, and we do not see how the rule can be laid down so broadly without doing violence to the plain language of the commerce clause of the constitution which limits the Federal power to interstate subjects. Our view is that in cases like the one at bar, commerce must be regaeded as of two kinds, intra and interstate, and the status of the employees must be determined by the kind of commerce they are engaged in at the time the injuries were sustained. If they were engaged in interstate commerce the Acts of Congress apply; if they were engaged in intrastate commerce the Federal statutes have no application." In Behrens v. Railroad Company, 233 U. S. 473, the principle is laid down that it is the particular work in which the employe is engaged at the time of the injury which counts, and if the employe, at the time of the injury, is engaged in a duty connected with intrastate commerce, the mere fact that immediatly upon the completion of that work he expects to engage in a work connected with interstate commerce does not bring him within the Federal Act. To hold that decedent was engaged in interstate commerce at the time he was injured the court would be obliged to find, without any evidence to warrant such finding, that the coupling of an intrastate car routed to an intrastate point, to an interstate train constituted an act connected with interstate commerce. It does not follow that the mere coupling of an intrastate passenger car to an interstate train constitutes an act connected with interstate commerce in the absence of any evidence to the effect that the intrastate car was actually used for the transportation of interstate commerce. The status of the car in this instance is not determined by the character of the train. In Van Brimmer v. Railroad Company, 190 Fed. Rep. 394, Judge Russel held: "Where a railroad brakeman was injured while engaged in making a flying switch to set out a car transported wholly in intrastate traffic, though it was a part of the train carrying both interstate and intrastate freight, his injury did not occur while he was engaged in interstate commerce, and therefore was not within the Federal Employe's Liability Act under the rule that, if the employe when injured is engaged wholly in the performance of service in furtherance of intrastate business the act does not apply." In the case at bar the appellant has failed, in the burden cast upon it, to establish that McLaughlin at the time he was injured was an interstate employe.

Appeal dismissed.

C. P. of Northampton Co.

Controller's Report

County controller—Annual report of.

The annual report of the county controller made to the court of common pleas of the county, is to be made by the acting controller, and not by an ex-controller.

Report of George F. P. Young, Esq., ex-controller, and report of Dr. Robley D. Walner, acting controller, with application by each to permit the same to be filed.

James W. Fox, for Dr. Robley D. Walter.

George F. P. Young, per se.

January 28, 1918. STEWART, P. J.— Two reports have been presented to us. One was prepared by George F. P. Young, Esq., the ex-controller, and one by Dr. Robley D. Walter, the acting controller. The question now before the court is which is the report contemplated by the Act of 27th June, 1895, P. L. 403 and its supplements. Mr. Young was the first controller in this county. Prior to his incumbency part of the work was done by the county auditors. The most important duty of the latter was to audit the accounts of the county officers, and to make report of the same to the court. When the auditors' report was unappealed from, it became conclusive. In the same way the report of the controller is an important document, as it takes the place of the county auditors' report, and fixes or discharges the liability of county officials and their sureties. The sixth of section of the Act of 6th of May, 1909, P. L. 434, provides that the county controller shall, in the month of January every year make a report, verified by oath or affirmation, to the court of common pleas of said county, etc. The first question is, what party is meant? The act refers to the controller, and not to the ex-controller. It must mean the acting officer. If it had been intended to refer to any other party, the legislature would have said so. To hold that it meant the ex-controller would be changing the act. The report is then to be

published in such newspapers published in the county, as the controller may direct, at a cost which shall not exceed one thousand dollars ($1000.00) in any one year. The publication meant by that section is the report of the controller for the time being, and not that of a preceding controller. It, therefore, follows that the report of George F. P. Young, Esq., is not entitled to be either filed or printed at the expense of the county. The report of the present controller is the legal report, and it is, now, filed, and should be published by him.

C. P. of Delaware Co.

Wolford v. Warrington

Foreign Attachment — Residence — When Writ Quashed.

Where a man having a residence in Pennsylvania, marries a woman who owns a hotel in Florida, and lives in the hotel during the winter but continues to maintain, and intends to return to his Pennsylvania home in the spring, his residence continues in Pennsylvania, and a writ of Foreign Attachment against him will be quashed.

Rule to quash writ.

William Taylor for rule.

J. H. Hinkson and *J. D. Ledward*, contra.

December 3, 1917. BROOMALL, P. J.— This writ was issued on November 15, 1916. On May 1, 1917, the defendant procured this rule to quash the writ. The burden is on the plaintiff to show that the defendant was not a resident of Pennsylvania, and was not in Delaware County on November 15, 1916.

In support of this burden the plaintiff shows that at that time the defendant was in Florida, living as a boarder with his wife in a hotel belonging to her. Where a man lives is presumptively his residence. In order to parry this presumption and carry the burden which now shifts to the defendant, he attempts to show a residence at No. 3643 Locust street, Philadelphia. It appears that this property is occupied by his sister, as the tenant of the whole of it, at a monthly rent of thirty-five dollars, who maintains it as her home. She sublets a part of it for a monthly rent of twenty dollars. He renders pecuniary aid to her, to assist her in the maintenance of her home. In this house there are two rooms, one of them used as an office and the other as a bedroom furnished by the defendant. The office room is used by the defendant for his busidess of a real estate broker and operator. Another person occupies the office room, who transacts business for himself, and also receives the defendant's mail and forwards it to him in Florida or wherever he may be. The bedroom is used as a place to keep clothing and also a place where he can sleep while in Philadelphia. As between him and his sister, these two rooms are rated at five dollars per month. When he is not in Philadelphia, she has the privilege of renting the bedroom. If she is short in her expenditures he gratuitously helps her out. These were the conditions which existed before his marriage, and at that time they would fairly support a declaration of an intention by him, that he was making the Locust street house his place of residence. The burden now shifts to the plaintiff to show that a change of residence took place by reason of the marriage. He was married on September 16, 1916, in New York, and after a honeymoon spent in hotels in the North, he and his wife went to live at her hotel in Florida. They expected to spend the winter months in Florida, and the summer months in the North. When they came North in the spring of 1917, he and his wife lived in the Locust street house but about a week, during the summer of 1917. With this exception, she lived at Stone Harbor, a summer resort, and he spent the week-ends with her, and when he was not traveling, lived in the Locust street house. Was his home in Florida or in Philadelphia? For Northern men and women, Florida is a place of winter resort. The defendant has not voted for a number of years. It does not appear where he paid his personal tax. The question is this, does a man who has a residence in Philadelphia lose it by going with his wife to Florida to live in her hotel, for the purpose of spending the winter months there, expecting to return to Philadelphia, to his place of residence in the spring, and who does so return? We think he does not. A good service of summons process might have been had on the defendant on November 16, 1917, by leaving it at No. 3648 Locust street, Philadelphia, with an adult member of the family, with whom he resided.

It therefore follows, that we quash this writ.

C. P. of Lackawanna Co.

McGurrin v. Hudson Coal Co.

Workman's Compensation Law—Ruling of Compensation Board—When Final.

Under Section 409 of the Workman's Compensation Act of June 2, 1915, P. L. 736, the ruling of the compensation board in reversing the finding of a referee and setting aside his award is final when there is no question of law involved.

Appeal from finding of Workman's Compensation Board.

Rodger J. Devers for Plaintiff.

W. J. Torrey for Defendant.

November 5, 1917. EDWARDS, P. J.—According to Section 409 of the Compensation Act of June 2, 1915, P. L. 736, "a referee's finding of fact shall be final unless the board shall allow an appeal therefrom as hereinafter provided. The board's findings of fact shall in all cases be final. From the referee's decision on any question of law an appeal may be taken to the board, and from any decision of the board on a question of law an appeal may be taken to the courts as herein provided."

In the present case the board reversed the findings of the referee and set aside the award. There is no question of law involved. The latest adjudication on this matter has been rendered by the Supreme Court in the case of Poluskiewicz v. Phila. & Reading C. & I. Co., 257 Pa. 305.

Appeal dismissed.

ORPHANS' COURT

Logan's Estate

Widow's appraisement—Method of Holding—Interest—Notice.

The fact that a second-hand automobile, which was appraised at $250, afterward sold for $300, is no evidence of undervaluation or collusion or wrongdoing on the part of the appraisers.

The appraisers first valued all of decedent's personal property, without knowing which the widow would elect to take, and then set aside to her the articles which she chose, at the appraised price. HELD, to be a manifestly fair method of appraisement.

The appraisers awarded to her a certificate of deposit and a judgment at their face value, without taking the interest into consideration. HELD, that the interest, up to the time of the appraisement, must be accounted for as part of the estate.

A refusal to permit the presence of interested heirs at an appraisement is a fact to be taken into consideration when the fairness of the appraisement has been questioned.

Exceptions to widow's appraisement.

Logan & Logan for exceptions.

Cochran, Williams & Kain, contra.

February 18, 1918. WANNER, P. J.—The exceptions to the appraisement of the real estate in this case have been withdrawn. Those alleging the undervaluation of an automobile and objecting to the award of a certain certificate of deposit by the decedent in the Peoples National Bank of Stewartstown, for $700.00, and a judgment of the decedent against L. G. Gemmill, No. 706, January Term, 1916, for $900.00 at their face value only, when they also carried accrued interest, are insisted upon.

While it is true that a small second-hand roadster appraised at $250.00, was afterwards sold for $300.00, that fact alone is not conclusive evidence of undervaluation, or of any collusion or wrongdoing on the part of the appraisers, against whose character and good faith in this transaction nothing is either alleged or proven.

It is a matter of common knowledge that the value of a second-hand automobile is most uncertain, at all times, and has a wide margin for the exercise of honest individual judgment in attempting to fix it. The general good judgment of these appraisers appears in the fact that at a sale of the personal goods awarded to the widow, which was held several months after the appraisement, the difference between the appraisement and the proceeds of sale of seven hundred dollars worth of chattels was only about $57.00.

The method of holding this appraisement was manifestly fair, and has the approval of judicial decisions. They first appraised all the decedent's personal property, without knowing which the widow would elect to take, and then after she had made her choice, set apart the articles chosen for her at the general appraisement price. This exception must be dismissed.

Those against the award of both principal and interest on the certificate of deposit and the judgment set apart to the widow, however, should be sustained. Although at the time of the appraisement, it may not have been known precisely what interest would be payable, the certificate of deposit having now matured, interest is collectible

thereon from its date. As the interest on this certificate of deposit and upon the judgment note in question, if given to the widow, would increase her allowance to more than the statutory sum of $5000.00, she should only receive the principal in each case, and the interest up to the date of the appraisement should be retained as part of the decedent's estate.

Another ground of exception to the appraisement generally is the fact that exceptants were not notified of the time and place of holding the appraisement, though they had requested it, in order that they might be present when it was held. No ruling that such a refusal to give notice would be sufficient ground upon which to set aside the appraisement has been cited, and we know of no authority for so doing. A refusal to permit the presence of interested heirs at such an appraisement however, is a fact for consideration along with the other proven facts in the case, in determining the fairness and justice of the appraisement, when it is objected to upon any ground raising that question.

The second and third exceptions are sustained. The principal sums due on the certificate of deposit and the judgment of the decedent in question are awarded to the widow, Nettie B. Logan, and it is ordered that the interest which had accrued thereon up to the date of the appraisement, shall be accounted for as part of the decedent's estate hereafter, by said Nettie B. Logan as administratrix of the estate of Curtis E. Logan, deceased. The cost of this proceeding to be paid out of the estate.

O. C. of Schuylkill Co.

Grenbowski's Estate

Specific performance—Acts of February 24, 1834, P. L. 75; 1889, P. L. 157.

The act of February 24, 1834, P. L. 75, provides for legal representatives of a decedent or the purchaser of real estate or other person interested to have specific performance of a written contract.

The act of 1889, P. L. 157, requires that notices shall be given the heirs when an application of this nature is made

A bill for specific performance must show that the decedent contracted in writing to sell or convey his real estate or that he authorized another to contract for him; that the decedent received part of the purchase money and that he had knowledge of the contract.

Petition for Specific Performance.

Carl H. Wagner, for petition.

January 21, 1918. WILHELM, P. J.—This is the application of Edmunda Gross, administratrix, for a decree of specific performance of an alleged agreememt of sale, entered into by the decedent, praying for an order to execute and deliver a deed in fee simple to the purchaser of certain real estate upon the payment of the balance of the purchase money.

The petition sets out that Thomas Grenbowski died seized of a piece of real estate, known as No. 2951 Alter Street in the City of Philadelphia, and that the decedent through his duly constituted agent entered into a written contract with one Edward Mowbray for the sale and conveyance of said premises for the price or sum of Nine Hundred Dollars, and that a copy of the contract is attached to the petition and marked Exhibit A.

That the contract has since been assigned by the purchaser to Frederick R. Gerry for whom the purchaser was acting as agent in said transaction.

The petition also contains the allegation that twenty-five dollars was paid at the time of the execution of the contract, and seventy-five dollars was subsequently paid on account of said purchase money.

There is no allegation that any of the money paid in pursuance of this contract was received by the decedent.

It is presumed that the Act of 24 February, 1834, section 15 P. L. 75, is relied upon to secure the order prayed for. This section of the act provides: "Whenever any person shall, by a bargain or contract in writing, bind himself to sell and convey any real estate within this commonwealth, and shall die seized or possessed of such real estate, without having made any sufficient provision for the performance of such bargain or contract, it shall be lawful for the executors or administrators of such decedent, or for the purchaser of such real estate, or other person interested in such contract, to apply, by bill or petition, to the Orphans' Court having jurisdiction of the accounts of such executors or administrators to decree the specific performance of such contract."

The difficulty here lies in the fact that this decedent did not contract in writing to sell his real estate. Exhibit A. attached to

the petition shows that the contract was executed by Thomas A. Mullen, Agent, of the first part, and Edward Mowbray of the second part.

There is nothing in this petition to show that the decedent contracted in writing to sell or convey his real estate or that he authorized any person to contract for him. It is not alleged that the decedent received any part of the purchase money, neither is it shown that he had any knowledge of this contract.

When this petition was presented, counsel stated that under the authority of West Hickory Mining Association v. Reed, 80 Pa. 38, it is unnecessary to give notice to heirs when an application of this character is made, and it is presumed that, relying upon that authority, no notice was given, and it is not the intention of the petitioner to give notice to the heirs of the decedent.

The Act of 1889, section 1, P. L. 157, requires that notice shall be given to heirs when an application of this nature is made.

It is improper to grant the prayer of this petition upon the ground that the decedent entered into a parol contract for the conveyance of his real estate. There is no proof or offer that a parol contract was entered into. Neither is there any allegation that the contract has been so far executed that it would be against equity to rescind it.

The petition shows that the decedent did not enter into a written contract to sell his real estate. It does not show that he entered into a parole contract to make a sale. No notice has been given to the heirs of this application as the law requires, therefore, the application should be refused.

The petition is dismissed at the cost of the petitioner.

QUARTER SESSIONS

Road in East Manchester Township

Road View—Petition—Naming of Route.

The petition for the opening of a new road not only gave the termini, but marked out the route over which the proposed road was to be constructed, and the names of the owners of the land through which it was to pass. HELD, that the report must be set aside.

The petition for the view lies at the foundation of all the subsequent proceedings, and can do no more than state the beginning and ending.

Exceptions to Report of Viewers.

Stewart & Gerber and *J. G. Glessner* for exceptions.

W. A. Miller, contra.

February 11th, 1918. Ross, J.—Numerous exceptions were duly filed to the report of the above designated view, but because the 1st and 4th exceptions filed on October 11th, 1917, are fatal to the report, it will be unnecessary to here discuss any of the other exceptions.

It appears in the petition that the termini of the proposed road were mentioned, but the petition also marked out the route over which the proposed road was to be constructed with several given points between the point of beginning and the point of ending.

The names of persons owning the lands on the route through which the petitioners asked to have the proposed road laid out were given in the petition. The report of viewers practically follows the route proposed by the petitioners.

The exceptions are as follows:

"1. The petition in the above case not only designates the termini of the said road but designates the route between the terminal points, a matter which is exclusively for the viewers."

"4. The petition in the above case is defective, in that it designates the route and properties through which the proposed road is to run, between the termini."

The law is well established that "the petition for the view lies at the foundation of all the subsequent proceedings, and can do no more than state the beginning and ending. If an intermediate point be prayed for, the viewers will be refused, and if by oversight they be appointed the report will be quashed. This is the uniform practice, and the reason is, that the law requires the viewers to lay out the road, having respect to the shortest distance and the best ground for a road, and in such manner as to do the least injury to private property * * * * Even the court cannot designate an intermediate point in the order;" Road in Lower Merion, 58 Pa. 66; Road in Ottercreek Township, 104 Pa. 261; Franklin Township Road, 54 Pa. Sup. Ct. 293.

The first and fourth exceptions filed October 4th, 1917, are sustained and for that reason the report of the viewers is set aside at the cost of petitioners.

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COMMON PLEAS

Hardnett Company v. Poultry Fancier Publishing Company.

Distribution—Unauthorized Statements — Ratification of Contract—Estoppel—Attorney's Compensation.

A, an officer of C, the insolvent corporation, as an agent for B, sold and delivered to C a press and other material with the understanding that B was "to carry" the machinery so sold until it was "convenient for C to pay for it." Subsequently A, as an inducement for S and M to purchase stock in the corporation, stated to them that the equipment of the plant was entirely free of debt. Before the auditor distributing the balance on the account of the receiver of C, B claimed the full purchase price and the auditor awarded him a dividend thereon. On exceptions filed, HELD, that in the absence of any testimony to show that A had been authorized to make such untrue declaration, that the exceptions must be dismissed.

A agreed to sell his stock in the C company to the company for a fixed sum, part to be paid in cash and the balance in installments, secured by judgment. On receipt of the cash he sent the stock to the secretary of the company with instructions to hold the same until the judgment was secured. C refused to give the judgment and after some correspondence expressed its willingness, by its attorney, to declare the whole thing off but directed the secretary to hold on to the stock. Before the auditor, A claimed the balance of the purchase price. HELD, that exceptions to the allowance of the claim must be dismissed.

E, as attorney, successfully resisted the payment of claims amounting to $1227.12. HELD, that an allowance of $300 to him out of the fund for distribution, will be sustained.

D advanced to the corporation $3000 to pay for the stock of A, under an agreement that $3000 worth of stock was to be transferred to him. By reason of the failure of the corporation, acting under his advice, to give the judgment desired by A, the stock was never delivered to the company, or any part to him. The auditor found that his participation in the meetings of the corporation as president and director, and his failure to assert any claim for the money advanced until after the appointment of the receiver, fixed his status as that of a stockholder, and rejected the claim. HELD, that exceptions to this finding must be dismissed.

A presented a claim for money loaned to the corporation. As others had been induced to loan money to the corporation by reason of his statements that it was not indebted to him, the auditor rejected the claim. HELD, that exceptions to his findings must be dismissed.

No. 4, January Term, 1915.

Sitting in Equity.

Exceptions to Auditor's Report.

V. K. Keesey for exceptions to disallowance of Delone claim, to the allowance of the Hardnett claim, and in not allowing a set-off against the awarded Haney claim.

Niles & Neff for exceptions to the allowance of the Hardnett and Haney claims.

John J. Bollinger for exceptions to disallowance of Haney's smaller claim.

March 4, 1918. Ross, J.—This court appointed Ray P. Sherwood auditor to make distribution of a balance appearing on the account of Alvin R. Nissley, who was the receiver of the Poultry Fancier Publishing Company, to and amongst those legally entitled thereto. The balance on the account was not sufficient for the payment in full of all claims presented by creditors.

Among the claims was one presented for the R. W. Hardnett Company for $2293.25 for an optimus press, motor castings, &c., which the claimant alleged he had previously sold and delivered to the Poultry Fancier Publishing Company. The allowance of the claim was objected to and the claimant produced proof which satisfied the auditor of its validity, and he allowed it to participate with the claims of other general creditors in the distribution and awarded a pro rata dividend to the claimant thereon. That award by the auditor is made the subject of exceptions by the First National Bank of Hanover, Pa., and Charles J. Delone, who are creditors of the insolvent company.

On page 16 of the auditor's report he reports the facts as follows:

"E. D. Haney, for the R. W. Hardnett Company, in the fall of 1912, sold and delivered to the Poultry Fancier Publishing Company an optimus press with motor roller equipment and punching machine, cutter and press for the sum of $2393.25." * * * *

"That said personal property was bought with the understanding that claimant was to carry them until such time as it would be convenient for the Poultry Fancier Publishing Company to pay for them. That said personal property has never been paid for by the Poultry Fancier Publishing Company. That at the time of said sale of said personal property by the claimant through its agent, E. D. Haney, that the said E. D. Haney was treasurer and stockholder of the claimant's company. That in the fall of 1913, E. D. Haney, who was also an officer of the

Poultry Fancier Publishing Company, and other officers of the Poultry Fancier Publishing Company, to wit, F. D. Sutton and F. W. DeLancey, interested C. S. Shirk and C. N. Myers in the purchase of stock of the Poultry Fancier Publishing Company, with the object of moving the Poultry Fancier Publishing Company's plant to Hanover, Pa. That at said time E. D. Haney stated to Messrs. Shirk and Myers that the equipment of the plant was entirely free without any debt. That E. D. Haney at said time delivered to C. N. Myers Exhibit No. 70, R. P. S., and declared that the same was a correct statement of the assets and liabilities of the Poultry Fancier Publishing Company, and that the Poultry Fancier Publishing Company owed nothing more than was shown on this statement. That said declaration of E. D. Haney, together with a statement marked Exhibit No. 70, R. P. S., influenced Messrs. Shirk and Myers in purchasing stock of the Poultry Fancier Publishing Company. That on December 26, 1914, the R. W. Hartnett Company filed in the Court of Common Pleas to No. 4 of January Term, 1915, its bill in equity against the Poultry Fancier Publishing Company for the appointment of a receiver, recorded in Equity Docket No. 12, page 331, wherein the claimant alleged it was a creditor of the Poultry Fancier Publishing Company to the sum of about $950.00."

It was also found by the auditor that "no testimony has been offered to show that the claimant authorized Haney to make this declaration."

On page 19 of the auditor's report, he asserts as a fact that, "No testimony is offered in contradiction of the witnesses to the effect that the press and other personal property were sold and delivered to the company, and that the purchase price thereof is unpaid, the officers of the company testifying in behalf of the claimant."

An examination of the notes of testimony taken before the auditor plainly justifies his conclusion of fact; and although some of the exceptions directly question those findings of fact, there is nothing on the record which induces the court to change or modify them. "Unless the finding of an auditor be manifestly erroneous, the court will not set it aside;" Coleman's Assigned Estate No. 1, 200 Pa. 29.

But one set of exceptions, that of the First National Bank of Hanover, and the argument of its astute counsel, are to the effect that the auditor has deducted an erroneous legal conclusion from the facts as he has stated them in his report. After a careful study of the exceptant's exceptions and the arguments in support thereof, we are led by the reasoning of the auditor, to the affirmance of his legal conclusions. The exceptions filed to the award of the auditor on this branch of the case are, therefore, dismissed.

E. D. Haney presented a claim amounting to $7000.00, which was represented to be a balance due him from the Poultry Fancier Publishing Company on a verbal contract for the purchase of the claimant's stock, in the month of June, 1914.

The auditor found the following facts from all the testimony taken before him pertaining to the claim:

"That the Poultry Fancier Publishing Company, prior to June 8, 1914, entered into a verbal agreement with the claimant for the purchase of all his stock in the Poultry Fancier Publishing Company for the sum of $9000.00. That $3000.00 of said consideration was to be paid in cash, and the balance of $6000.00 by six notes of the Poultry Fancier Publishing Company, each in the sum of $1000.00, to be dated April 10, 1914, maturing annually; the deferred payments to be secured by judgment note.

That subsequent thereto, F. W. Delancey, President of the Poultry Fancier Publishing Company and on its behalf, went to Philadelphia, to wit, on or about June 6, 1914, saw the claimant, and after talking the matter over, the original agreement between the Poultry Fancier Publishing Company and the claimant was modified so as to require a cash payment of $2000.00, and seven notes in the sum of $1000.00 each, maturing annually—the deferred payments to be secured by judgment note for $7000.00 as evidenced by a memorandum of an agreement. That said memoranda was executed by E. D. Haney, but was not executed by the Poultry Fancier Publishing Company. That at said time $2000.00 in cash was paid by the Poultry Fancier Publishing Company through its agent, F. W. Delancey, the president of the company, to the claimant for claimant's stock.

The claimant, upon receipt of said sum of $2000.00, immediately assigned his stock of upwards of twelve thousand shares in the Poultry Fancier Publishing Company to F.

D. Sutton, the secretary of the company. That E. D. Haney delivered said stock so assigned to F. D. Sutton, the Secretary of the Poultry Fancier Publishing Company, with instructions to said F. D. Sutton to deliver the same to the said Poultry Fancier Publishing Company on receipt by F. D. Sutton of seven notes in the sum of $1000.00—said deferred payments to be secured by judgment.

That the Poultry Fancier Publishing Company had notice of these instructions.

That the Poultry Fancier Publishing Company refused to execute the said seven notes to be secured by a judgment, and also refused to deliver the notes as agreed.

That subsequently, C. J. Delone, counsel for the Poultry Fancier Publishing Company, was authorized by the said company to go to Philadelphia, and try to make definite arrangements with Mr. Haney for the purchase of his stock.

That C. J. Delone, counsel for the Poultry Fancier Publishing, went to Philadelphia, met Mr. Haney, the claimant, and discussed the proposition. That at no time was there any difference as to the price to be paid for the stock, the only difference being that claimant wanted a judgment note to secure the deferred payment.

That claimant, on July 16, 1914, wrote to the Poultry Fancier Publishing Company saying that the proposition is withdrawn—would not consider anything but sale on cash basis.

That on the same date, to wit, July 16, 1914, the Poultry Fancier Publishing Company notified F. D. Sutton not to return or otherwise dispose of agreement, notes, stock, etc., or any correspondence relating to the purchase of stock of E. D Haney, but to produce the same at the directors' meeting to be held July 21, 1914. That no directors' meeting was held on said day so far as appears by the testimony taken or exhibits filed.

That on July 20, 1914, the claimant sent to F. D. Sutton a telegram in which claimant stated, "Negotiations are off."

That on July 23, 1914, C. J. Delone as attorney for the Poultry Fancier Publishing Company addressed a letter to claimant in which the Poultry Fancier Publishing Company expressed a willingness to have the negotiations terminated, and requested the return of the $2000.00 paid.

That on October 12, 1914, E. D. Haney, F. W. DeLancey and F. D. Sutton resigned as officers and Directors of the Poultry Fancier Publishing Company.

That the Board of Directors of the Poultry Fancier Publishing Company consisted of five members.

That the verbal agreement between the Poultry Fancier Publishing Company and claimant is established by the testimony of four of the Directors of the Poultry Fancier Publishing Company, to wit, F. W. DeLancey, C. N. Myers, C. S. Shirk and F. D. Sutton.

These findings of fact are affirmed by the Court.

The Auditor allowed the claim to participate in the distribution and awarded him a pro rata dividend with the other participating general creditors

Exceptions were filed to the auditor's findings and award on the claim by the First National Bank of Hanover and Charles J. Delone, other creditors.

In reviewing the evidence we find, as was found by the auditor, that five of the members of the board of directors testified that the agreement in controversy was entered into between the claimant and the Poultry Fancier Publishing Company for the purchase of his stock; and there was testimony that after the company had paid to claimant $2000.00 and that thereupon claimant assigned the stock to the Secretary of the company ostensibly for the company under the terms of the agreement. The company evidently knew of this, and refused or delayed the performance of the agreement on its part. The trend of the evidence strongly indicates that it, the company, was playing "fast and loose" with the claimant. The auditor, in his report, has observed, and the observation we consider as a fact, that the company, instead of repudiating its contract, ratified it by keeping the stock and directing Mr. Sutton not to deliver it to the claimant. The facts as the auditor has reported them are entirely warranted by the testimony as we have reviewed it, and under the authorities which he cites, we conclude that his legal conclusions from those facts should be sustained. All the exceptions filed to this branch of the auditor's findings are, therefore, dismissed and the auditor is sustained.

One set of exceptions was filed to the auditor's allowance of a claim for professional services rendered the creditors by John J. Bollinger, Esq. We are not convinced by any argument brought before us

that the auditor violated any legal propriety under the facts as he has reported them. That exception is, therefore, dismissed and the auditor's award is sustained.*

The auditor's refusal to allow the claims of C. J. Delone for $3000.00† and the claim

* John J. Bollinger, Esq. presented his own claim for services rendered to creditors of the Poultry Fancier Publishing Company in the matter of contesting the claim of C. J. Delone, Esq., to participate in the distribution, and in contesting the claims for preference of J. C. Schumberger and William G. Minnich at the various meetings held by the auditor, in the sum of $500.00.

As the former claim was not allowed by your auditor, and the latter two claims for preference were not allowed, your auditor finds that Mr. Bollinger was instrumental in securing for general distribution to unsecured creditors, the sum of $1227.12—which would have been the respective amounts awarded upon these claims had they been allowed as claimed.

Your auditor is of the opinion that $300.00 would be adequate and fair compensation for the services rendered, and in making distribution will allow that amount to J. J. Bollinger, Esq.

† The auditor, after finding that D advanced money to C to buy A's stock, says:

Under the above facts is claimant entitled to recover the $3000.00 advanced to the Poultry Fancier Publishing Company paid for a consideration which had failed?

The corporation had a right to purchase its own stock under the statutes of Pennsylvania. A corporation can enter into a valid and binding contract the same as an individual—it is not necessary that its contract be in writing; Hamilton v. Lycoming Ins Co., 5 Penna. State 339.

The Poultry Fancier Publishing Company attempted to do what it was bound to do under its contract with Mr. Delone to purchase the Haney stock. No time was fixed by the contract for the purchase of stock, or as to the purhase price to be paid therefor, or the manner in which this price should be paid. The Poultry Fancier Publishing Company was in reality acting not only for itself, but as the agent of Delone so far as the purchase of 3000 shares of stock was concerned.

The Poultry Fancier Publishing Company had entered into an agreement with Haney for the purchase of his stock, paid him a part of the consideration, and the stock was assigned by Haney to F. D. Sutton as Secretary of the Poultry Fancier Publishing Company with the full knowledge of the Directors, and of Delone, their counsel—the Poultry Fancier Publishing Company was then in a position to carry out its agreement with Delone, and to deliver to him 3000 shares of stock. The Poultry Fancier Publishing Company refused to deliver to Haney the notes which were a part of the consideration of the contract, together with a judgment note for the deferred payments upon claimant's advice, as claimant himself admitted there was never any difference as to the price. It seems to your auditor that this was a valid consideration, an equally valid subject matter, and the parties having met and agreed upon the terms of the purchase and sale.

The rule of law is that an action for money had and received will lie to recover money paid by plaintiff to defendant, for a consideration which had wholly failed; Hudson v. West, 189 Pa. 491; Lieb v Painter, 42 Sup. 339; unles the failure of consideration is due to some fault on the part of the plaintiff himself; 27 Cyc. page 856.

Here the Poultry Fancier Publishing Company was acting under the advice of Delone in refusing to deliver the notes for the deferred payments to be secured by judgment—both the claimant and the Poultry Fancier Publishing Company knew that the stock was in the hands of the Secretary of the Company for the purpose of transfer, and yet it was on the advice of Delone that the transfer was not made. No demand was ever made by the claimant for his stock, upon the Poultry Fancier Publishing Company, claimant brought no action in any form against the said Company to protect his rights—he did not act as a creditor of the Company—on the contrary, his actions were such as would be expected from a stockholder in the Company—he permitted himself to be elected a Director and President of the Poultry Fancier Publishing Company—he took charge of the active management of the said Company; the claimant now contends that because no stock certificate was actually issued to him under his agreement with the Company, that he is entitled to recover upon a consideration that failed. It seems to your auditor that it was claimant's duty at the time that he derived knowledge of the affairs of the Company to take positive and active steps to make his contract void, and to demand a return of his money—instead of taking such steps, it seems to your auditor that he has ratified the contract by his course of conduct in the business affairs of the Company; Leaming v. Wise, 73 Pa. 173; Harvard Rev. v. Turner, 155 Pa. 349; Hilliard v. Wood Carving Co., 173 Pa. 1; Inlow v. Christie, 187 Pa. 186; Mukeloff v. Boltz, ———, 215 Pa. 124; Cunningham v. Wanamaker, 217 Pa. 497; McCullough v. Insurance Co., 2 Supt. Ct. 233; his election as President and Director of the Poultry Fancier Publishing Company to your auditor's mind was a ratification of his agreement with the Company, and a waiver of any right which he might have had against the Company for failure to deliver the stock certificates. His participation in the meetings of the said Company, and his acts, fixed his status as a stockholder.

A certificate is not necessary to make one a stockholder in a corporation, nor does the absence of a certificate deprive a stockholder of rights which he has in the company; 10 Cyc. 389-390-526,

The first time the claimant saw fit to make any claim of any character against the Poultry Fancier Publishing Company was on July 16, 1915, after the assets of the Poultry Fancier Publishing Company had been reduced to cash, and your auditor, therefore refuses to allow claimant to participate in the distribution for the following reasons:

(a) That the failure of consideration was due to a fault on the part of the claimant himself.

(b) By reason of the fact that claimant ratified his agreement with the Company by acting as the

of E. D. Haney for $975.00‡ is sustained by the reasons set forth in his report, and should not be disturbed. All exceptions thereto are dismissed.

The auditor is to be complimented on his careful and clear analysis of the complications which the testimony reveals in this a justment.

All exceptions filed to the findings of the auditor are dismissed and his report is hereby confirmed.

President and Director of the Poultry Fancier Publishing Company, and

(c) By reason of his failure to assert any claim against the Poultry Fancier Publishing Company until after the appointment of a Receiver, and the conversion of the assets into cash.

‡From the testimony before him, your auditor finds the following facts:

That E. D. Haney loaned to the Company the following sums on the following dates:

May 13, 1913	$200 00
May 27, 1913	200 00
June 30, 1913	200 00
July 2, 1913	150 00
July 8, 1913	100 00
Aug. 28, 1913	75 00
Aug. 20, 1913	50 00
Total	975 00

That in October, 1913, the plant of the Poultry Fancier Publishing Company was located at Sellersville, Pa. That during the month of Oct., 1913, the claimant, F. D. Sutton and F. W. DeLancy, all of whom were officers of the Poultry Fancier Publishing Company, interested Messrs. C. S. Shirk and C. M. Myere in the purchase of stock of the company, and with the object of moving said plant to Hanover, Pa. That at said time F. W. DeLancey was President, claimant Treasurer, and F. D. Sutton Secretary of the said company. That in October, 1913, C. S. Shirk and C. M. Myers met the claimant, President and Secretary of the Poultry Fancier Publishing Company at Sellersville, Pa. That claimant stated at said meeting to Messrs. Shirk and Myers that the Poultry Fancier Company was not indebted to him, and that said statement of claimant's induced Messrs. Shirk and Myers to purchase stock in the said Poultry Fancier Publishing Company. Under the above findings of fact is claimant entitled to recover for money loaned to the company prior to the date of the purchase of stock in said Poultry Fancier Publishing Company by Messrs. Shirk and Myers, or are the foregoing facts sufficient to evoke a claim of estoppel so far as claimant is concerned?

The rule of law is "that when the conduct of a party has been such as to induce action by another, he shall be precluded from afterwards asserting to the prejudice of the other, the contrary of that which his conduct has induced the belief." The primary ground of the doctrine is that it would be a fraud in a party to assert what his previous conduct has denied when on the faith of that denial—others have acted; Gray's Appeal, 10 W. N. C. 458; Rettig & Son v. Becker, 11 Sup. Ct. 395 at page 399.

Claimant induced Messrs. Shirk and Myers to purchase stock from the Poultry Fancier Publishing Company on the strength of his own statement that the company was not indedted to him in October, 1913, after loans had been actually made by claimant to the company, and your auditor, therefore, holds that he cannot blow hot and cold by now stating to the prejudice of Messrs. Shirk and Myers, stockholders of the company, that said loan of $975.00 had not been paid whether in fact it was actually re-paid or not by the company to the plaintiff. Your auditor, therefore, refuses to allow the claim of E. D. Haney in the sum of $975 00 to participate in the distribution of the balance on the account.

C. P. of Delaware Co.

Hughes v. Murphy

Contract—Bailment—Execution.

Where one obtains possession of a chattel upon a written contract in which he declares that he has rented the chattel, that he is to pay a certain amount, in instalments, as rental and when paid the article shall become his property, but until the rental is paid no title is to be acquired by or vested in him, the contract is one of bailment and not a conditional sale. The absence of an express covenant to return a chattel at the end of the term does not turn a bailment into a conditional sale.

Where the bailee of a chattel replaces a part of it, such new part does not become the property of the bailor and may be sold upon execution against the bailee.

There can be no judgment excepting one on the verdict, unless a point for binding instructions is refused or reserved.

Where an execution creditor levies upon a bailed chattel and disputes the title of the bailor, he cannot upon interpleader recover upon a contingent interest of bailee.

Motion by defendant for judgment *non obstante veredicto.*

E. A. Howell for motion.

J. Borton Weeks, contra.

December 31, 1917. BROOMALL, J.—This was a sheriff's interpleader issue to try the title of an automobile which the defendants had levied on as the property of Joseph A. Senior, on April 4, 1916, in his possession, and which was claimed by the plaintiff to belong to him. On the trial it was admitted that the automobile belonged to the plaintiff unless title to it passed to Senior by virtue of a transaction between the plain-

tiff and Senior, which was evidenced by a writing, signed by Senior, of which the following is a copy:

"This is to certify that I. Mr. Joseph Senior, have received and rented of Thomas Hughes, the article or articles described in the annexed schedule, valued at $515.00, for the use of the said article or articles, and as rent for the same have this day paid to the said Thomas Hughes the sum of $250 as deposit, and promise further to pay to his collector or authorized agent the sum of $265.00, with note as collateral, payable $40.00 monthly with interest until the above-named amount is paid, at which time said rent shall cease, and said article become my property.

"The above-named article or articles to remain the property of Thomas Hughes and no title thereto to be acquired by or vested in me until this obligation is fully complied with on my part, and in event of failure to meet promptly any of said payment, I agree on demand, to surrender said article or articles to Thomas Hughes without process of law, and said T. Hughes is authorized to enter my premises by his agent or agents to remove the same, and to retain the sums already paid as rent or hire for the use of said article or articles while in my possession. And I also agree not to remove said article or articles from the premises I now occupy, or part with the possession thereof, without first obtaining the written consent of Thos. Hughes."

The rights of the parties depended upon the construction of this writing. Hence it was necessary for the court to construe it, and we did construe it as a bailment for hire and not a conditional sale. We see no error in this; Reading Automobile Co. v. DeHaven, 53 Pa. Supr. Ct. 344. The absence of an express covenant to return the property at the end of the term does not turn a bailment into a conditional sale; Id.

At this stage of the case the plaintiff was entitled to a verdict but it appeared that the top of the automobile was not the top which was on it at the time of the bailment, but was subsequently attached to it by the bailee. There was no dispute as to this. Evidence was introduced as to the value of this top which belonged to the bailee, and the jury was instructed to render a verdict for the defendant and to determine the value of the top, which was accordingly done and the value of the top was fixed at thirty-five dollars.

The defendants now move for a general judgment in their favor. There can be no judgment entered, except a judgment on the verdict, except that where a party presents a point for binding instructions, which is refused or reserved, he may move for judgment on the whole rocord; Act of April 22, 1905, P. L. 286, Stewart's Purdon, Vol. 6, p. 7139, pl. 35. But even if this had been done the defendants could not have more than they have now, a verdict in their favor, upon which they can enter judgment. Their real complaint is that the jury was not instructed to include in their valuation of property, the value of Senior's interest in the automobile. The remedy for this would be a motion for a new trial. But even if such motion had been made it would not avail them, because there was no issue as to Senior's interest in the automobile. The defendants did not levy on Senior's interest in the automobile. They would have had a right to do so; Meyers vs. Prentzell, 33 Pa. 482. They levied on the automobile. The plaintiff claimed title to it. Then the defendants had another opportunity to assert their right to proceed to sell Senior's interest in it. If they had done so, the interpleader would have been quashed, because a sale of Senior's interest could not effect the plaintiff; Logan v. Gest, 6 Del. Co. Reps. 242. And the defendants could have proceeded to sell Senior's interest. Even this would have passed nothing, after the bailee was in default; Cobb Chase v. Deiches, 7 Pa. Supr. Ct. 252. Instead of pursuing their right to sell Senior's interest in the automobile they took issue with plaintiff's claim of ownership, by categorically denying it, and this was the only issue presented at the trial and this issue has been properly decided. We, therefore, refuse defendant's contention and direct judgment to be entered on the verdict.

C. P. of Berks Co.

Brendle v. Schmehl

Negotiable Instruments — Accomodation Maker—Liability of Holder in Due Course.

Where the holder of a promissory note for value sues the maker thereof, evidence of an agreement between the maker and payee that the latter should alone be responsible, is insufficient to prevent judgment, the plaintiff having no knowledge of the agreement.

Rule for new trial.

Wm. J. Rourke for defendant and rule.

H. P. Keiser for plaintiff.

November 19, 1917. WAGNER, J.—The defendant asks for a new trial upon the third reason therof, which is that

"The Court erred in directing the jury to render a verdict in favor of plaintiff and against defendant for at least $1,386.

It was admitted by the defendant that he signed the note for $1,200. The principal of this note, with interest thereon, constituted the basis for the direction by the Court of a verdict for plaintiff for at least this sum. The defendant claims that this note was given upon an agreement between the payee and the defendant, which agreement was communicated to the plaintiff That is, there was an agreement between the payee and the maker at the time of the giving of the note that the maker was never to be called upon for the payment thereof. The evidence on this agreement is that of N. S. Schmehl. He testified that at the time he gave these notes to Mr. Hoverter, Mr. Hoverter had said that he would take care of them. This, as we view it, is a mere promise between the two that the payee would take care of the notes, and not an agreement that if these notes got into the hands of a third party that the sole person who was to be liable on the note was Mr. Hoverter, the payee. Defendant claims that this agreement as contended for by him was communicated to Mr. Brendle, who discounted the note. We fail to find any evidence of any communication of such an agreement even if the agreement be considered as one under which Mr. Schmehl was under no circumstance to be held liable for the payment of the note.

Defendant called Mr. Hoverter as a witness to show the communication of this agreement to Mr. Brendle. He testified that at the time the note was transferred by him to Mr. Brendle for a valuable consideration, he gave to him (Brendle) Mr. Schmehl's rating. He says "Mr. Brendle, of course was not acquainted with Mr. Schmehl. On the strength of the rating he discounted the note with the understanding that I was to make payment." He further says, "I showed Mr. Brendle the rating, and I told Mr. Brendle I considered Mr. Schmehl good, but that I would make payment on them as they matured, because I realized that Mr. Schmehl couldn't make payments on these notes at that time. That is what I said to Mr. Brendle." This is not evidence of a communication of an alleged agreement between him and the defendant that Mr. Hoverter alone was to be liable. On the contrary it is evidence that Brendle, the plaintiff, depended upon Mr. Schmehl's rating therefor, his name on the note, with the additional personal promise of Hoverter that he would also be liable. This promise to pay by Hoverter is not a release of Schmehl's liability. The position of the defendant as contended for in this third reason for a new trial is not supported by the evidence. Mr. Schmehl in his letter of April 25, 1914 to Mr. Brendle, in writing with reference to this note, distinctly says when he sends to him his check for $12.50 for a renewal of the note, "I would like to pay note in full but cannot do so at this time." He hereby acknowledges his liability on the note. Under the evidence the Court could not do otherwise than direct that as to this one note the jury would have to bring in a verdict in favor of the plaintiff.

Rule for new trial discharged.

C. P. of Northampton Co.

Raeder v. Stewart Silk Mill Co.

Practice—Question of law—Pleading of statute—"The Workmen's Compensation Act of 1915"—Constitutionality of.

Where the question of law raised by the affidavit of defense disposes of the whole ot the plaintiff's claim, the judgment should be for the defendant and not of nonsuit.

Where a statute is relied on for a defense, the party relying on it need not refer to, or negative an exception or proviso unless it is contained in the enacting clause.

"The Workmen's Compensation Act of 1915" is constitutional.

Motion for a nonsuit.

A. C. LaBarre for the plaintiff.

Aaron Goldsmith for the defendant.

February 11, 1918. STEWART, P. J.—Defendant in this case, by praecipe filed and upon argument, asks for a judgment of nonsuit. The "Practice Act, nineteen fifteen." page 483, provides as follows: "Section 4. Demurrers are abolished. Questions of law heretofore raised by demurrer shall be raised in the affidavit of defense, as provided in section twenty. * * * Section 20. The defendant in the affidavit of defense may raise any question of law, without answering the averments of facts in the statement of claim; and any question of law, so raised, may be set down for hearing, and disposed

of by the court. If in the opinion of the court the decision of such question of law disposes of the whole or any part of the claim, the court may enter judgment for the defendant, or make such other order as may be just," etc. The words "or make such other order as may be just" may be sufficient to support a judgment of nonsuit. In Barto v. Shaffner, 26 Pa. Dist. Rep. 957, it was held by President Judge Endlich that "The questions of law contemplated by section 20 of the Practice Act of May 14, 1915, P. L. 483, are those a decision upon which disposes of the whole or a part of the plaintiff's claim, such as under the old practice might be interposed by demurrer." The practice in the present case follows Anderson v. Carnegie Steel Co., 255 Pa. St. 33, a case not cited upon the argument, but which practically rules the present case. The proper judgment in this case is judgment for the defendant. The plaintiff brings his action of trespass to recover damages against the defendant corporation, and he alleges in his statement that on the eighth day of July, 1916, he was employed by the defendant company as a carpenter foreman in the city of Easton, and that in the discharge of his duties on the said day, he was seriously and permanently injured, through the negligence of the defendant. The defendant admits the contract of employment, and after denying its negligence, sets up as matter of law, "that the said plaintiff accepted the provisions of the Workman's Compensation Law of the State of Pennsylvania and being bound by the provisions therof, cannot maintain present action against the said defendant." The learned counsel for the plaintiff contends that "The Workmen's Compensation Act of 1915," page 736, is unconstitutional, and that he is entitled to maintain the present action. That act is the law in at least twenty-eight of the United States, in Canada, in England, and most of her colonies, in Mexico, Peru, Venezuela, Austria, Belgium, France, Japan, Italy, Norway, Russia, Sweden, Switzerland, and most of the other civilized nations of the world. In Schnader's and Storey's Pennsylvania Workmen's Compensation Law, Section 106, it is said: "Every elective workmen's compensation act which has been attacked before a state court of last resort has been held constitutional. The acceptance of the compensation plan contained in the Pennsylvania Compensation Act is optional and not compulsory either upon the employer (for the common law defenses were court-made and can be modified or abolished by the legislature), or upon the employe. And as the parties have a free choice it was competent for the legislature to make the acceptance of the compensation plan presumptive at the time of consummating the contract of service. Inasmuch as the Compensation Act provides that it shall not impair the obligation of any contract in force prior to December 31, 1915, it cannot contravene article I, section 10 of the Federal Constitution. Nor does it violate either the due process clause, or the equal protection clause of the fourteenth amendment." The conclusions above referred to, are amply sustained by the many cases to which the authors refer. It would be a waste of time to examine them in detail, but excellent discussions are found in Young v. Duncan, 218 Mass. 346, and In the Matter of Jenson v. Southern Pacific Co., 215 New York 514. The latter case is valuable as it practically overrules Ives v. South Buffalo Railway Co., a case in 201 New York 271, and as it also refers to the decisions of the supreme court of the United States. The act itself provides: "Section 301. When employer and employe shall by agreement, either express or implied, as hereinafter provided, accept the provisions of article three of this act, compensation for personal injury to, or for the death of, such employe, by an accident, in the course of his employment, shall be made in all cases by the employer, without regard to negligence, according to the schedule contained in sections three hundred and six and three hundred and seven of this article. * * * Section 302. (a) In every contract of hiring made after December thirty-first, one thousand nine hundred and fifteen, and in every contract of hiring renewed or extended by mutual consent, expressed or implied, after said date, it shall be conclusively presumed that the parties have accepted the provisions of article three of this act, and have agreed to be bound thereby, unless there be, at the time of the making, renewal, or extension of such contract, an express statement in writing, from either party to the other, that the provisions of article three of this act are not intended to apply, and unless a true copy of such written statement, accompanied by proof of service upon the other party, setting forth under oath or affirmation the time, place, and manner of such service, be filed with the bureau within ten days after

such service and before any accident has occurred. Every contract of hiring, oral, written, or implied from circumstances, now in operation, or made or implied on or before December thirty-first, one thousand nine hundred and fifteen, shall be conclusively presumed to continue subject to the provisions of article three hereof, unless either party shall, on or before said date, in writing, have notified the other party to such contract that the provisions of article three hereof are not intended to apply, and unless there shall be filed with the bureau a true copy of such notice, together with proof of service, within the time and in the manner hereinafter prescribed. * * * Section 303. Such agreement shall constitute an acceptance of all the provisions of article three of this act, and shall operate as a surrender by the parties thereto of their rights to any form or amount of compensation or damages for any injury or death occurring in the course of the employment, or to any method of determination thereof, other than as provided in article three of this act. Such agreement shall bind the employer and his personal representatives, and the employe, his or her wife or husband, widow or widower, next of kin, and other dependents." It was the plain duty of the plaintiff to set forth that he was exempted by the exceptions to the act. The rule is that where a statute is relied on for a defense, the party relying on it, need not refer to, or negative an exception or proviso unless it is contained in the enacting clause. In the absence of any such averment the presumption is "conclusive" that the parties accepted the provisions of the act. The whole subject both as to practice and as to the law, is, however, set at rest in Pennsylvania by Anderson v. Carnegie Steel Co., supra. Mr. Chief Justice Brown discusses every phase of the questions raised by the learned counsel for the plaintiff in the present case, adversely to him. It would be waste of time to quote what he so well said.

In the opinion of the court, the decision of the question of law, raised by the statement and affidavit of defense, disposes of the whole of the plaintiff's claim, and the court hereby enters judgment for the defendant.

C. P. of Lackawanna Co.

Dowd & Co. v. Goodman.

Affidavit for Defense—Averments—Sufficiency—Not Delivered on Sunday.

In a suit against defendant as accommodation endorser on a promissory note payable to plaintiff, an affidavit of defense is sufficient to prevent judgment which avers that the note was endorsed and delivered by defendant on a Sunday.

A note, bond or contract although executed on a Sunday is nevertheless valid if delivered on a week day.

Rule for judgment for want of a sufficient affidavit of defense.

Welles, Stocker & Torrey and *John M. Gunster* for plaintiff.

C. B. Little for defendant.

December 20, 1917. EDWARDS, P. J.—This is a suit against the defendant as accommodation endorser for M. S. Trucker, on a promissory note payable to the plaintiff. Regardless of the question of the liability of the defendant on the note in the face of the fact of that the affidavit of defense alleges a failure of consideration as between Trucker and the plaintiff, there is one other question raised in the affidavit, which, in itself, is sufficient to prevent judgment on the pleadings. It is averred by the defendant that the note in suit was endorsed and delivered by him on Sunday, November 12, 1916. Plaintiff's counsel, in the citation of authorities, must have overlooked the allegation as to delivery on Sunday, because the cases cited establish the proposition that a note, bond or contract executed on Sunday is nevertheless valid if delivered on a week day. One of the early cases in Pennsylvania is authority on this point, viz., Com. v. Kendig, 2 Pa. 448, wherein it is decided that "a bond is not perfected until delivery, and that a mere signing on Sunday does not render it void if not delivered until the day following." The same ruling is made by Judge Rice in Stevens v. Hallock & Co. et al., 7 Kulp 260. We refer also to Beitenman's Appeal, 55 Pa. 183; Sherman v. Roberts, 1 Gr. 261, and Williams v. Transit Co., 257 Pa. 354.

The exceptions in this case are overruled and the rule for judgment is discharged.

American Insulation Co. v. Lindemuth Engineering Co.

Contract—Acceptance of Offer—Reasonable Time.

Plaintiff offered to furnish and erect for defendant certain covering material. Defendant agreed to accept said offer if plaintiff would give bond for the proper completion of the work on time. Plaintiff consented to give the bond if defendant would pay the cost thereof. To this defendant replied that it would pay half the cost. Not having received an answer in five days, defendant placed its order elsewhere. Plaintiff then brought suit to recover the profits it would have made on the contract. The affidavit of defense denied liability, owing to the plaintiff's unreasonable delay in answering defendant's last offer. HELD, that a motion for judgment for want of a sufficient affidavit of defense must be denied.

The general rule of law in Pennsylvania is that a contract is concluded at the time of the mailing of the acceptance of an offer, and not at the time of its receipt by the party addressed.

If the offer itself fixes a time within which it must be accepted, the acceptance thereof must be made within the period specified. If no such time is fixed, as in this case, the acceptance must nevertheless be mailed within a reasonable time after the receipt of the offer or it will lapse.

What is a reasonable time in any case depends upon the location of the parties, the nature of the transaction, the usages of the trade or business in which the parties are engaged, and also upon the previous rules of conduct between the parties themselves in the matters in controversy, and is a question for the jury,

The statement must show clearly what items of damages or profits are claimed, and the defendant cannot be expected to deny in detail these matters connected with plaintiff's business of which it can have no personal knowledge.

No. 96, October Term, 1917.

Motion for judgment for want of a sufficient affidavit of defense.

Cochran, Williams & Kain for motion.

J. T. Atkins, contra.

March 11, 1918. WANNER, P. J.—The plaintiff seeks to recover damages from the defendant for breach of a contract which the latter contends was never closed between the parties. Their entire negotiations are contained in certain letters set forth in the pleadings.

The defendant company, located at York, Pennsylvania, in April 1917, was soliciting bids for certain non-conducting covering materials for use in the erection of a school building at West Chester, Pennsylvania.

On April 23rd, 1917, the plaintiff offered to furnish and to erect the same and to fully guarantee the work and materials, for the sum of $305.00.

April 25th, 1917, the defendant agreed to accept the plaintiff's offer, provided that it would also furnish a bond for the proper completion of the work on time.

April 26th, 1917, plaintiff replied objecting to furnishing the bond because the cost of so doing had not been included in its bid for the work, but proposed to furnish the bond if the defendant paid the expense.

April 28th, 1917, the defendant wrote the plaintiff insisting upon a bond being given "as a protection owing to the condition of the market and the scarcity of materials," and offered to bear half the expense of the same, if the plaintiff would pay the other half.

It is entirely clear that up to this point neither party had unconditionally accepted the proposal of the other and that no contract had been closed between them; Jaxtheimer v. Sharpville Boro., 238 Pa. 42; Dougherty v. Briggs, 231 Pa. 68.

Six days after the date of its letter of April 28th, 1917, viz; May 4th, 1917, the defendant received a letter from the plaintiff, dated May 3rd, 1917, stating that the plaintiff had procured the bond desired, and had charged the defendant with half the costs therefor, viz; $2.50.

May 5th, 1917, the defendant replied that the contract had been given to another party on May 3rd, 1917, because up to that time the plaintiff had not answered the defendant's letter of April 28th, 1917. The plaintiff thereupon brought this suit.

The main question involved in the case is whether or not the plaintiff's acceptance on May 3rd, 1917, was in time to hold the defendant to its offer of April 28th, 1917.

The general rule of law in Pennsylvania is that a contract is concluded at the time of the mailing of the acceptance of an offer, and not at the time of its receipt by the party addressed.

If the offer itself fixes a time within which it must be accepted, the acceptance thereof must be made within the period specified. If no such time is fixed, as in this case, the acceptance must nevertheless be mailed within a reasonable time after the receipt of the offer or it will lapse.

The case of Boyd v. Peanut Company, 25 Pa. Super. Ct. 199, qualifies the general rule as to the conclusiveness of the mailing of an acceptance by holding that it depends upon whether or not it was mailed within a reasonable time after the receipt of the offer.

What is a reasonable time in any case depends upon the location of the parties, the nature of the transaction, the usages of trade or business in which the parties are engaged, and also upon the previous rules of conduct between the parties themselves in the matters in controversy.

The defendant contends that in due course of mail, its letter of April 28th, 1917, must have reached the plaintiff on April 30, 1917, and that the plaintiff's delay in answering it until May 3rd, 1917, was unreasonable, as the letter only involved the question of whether or not plaintiff would bear half the expense of procuring the desired bond. The plaintiff had answered the defendant's letter of April 25th, 1917 on the next day, and defendant contends that it should also have done so in this case, instead of consuming three days in procuring the bond before sending an acceptance of the defendant's offer.

It is also alleged in the affidavit of defense, that there was an extraordinary rise in the price of labor and materials during the period of these negotiations which made it risky for the defendant to wait longer for an answer to defendant's letter of April 28th, 1917, before letting the contract.

Plaintiff's attention had been called in that letter to the "condition of the market and the scarcity of materials" as the reason for requiring a bond. Though these seem to be substantial reasons for a prompt answer to defendant's letter, we are of the opinion that the question whether or not the plaintiff's acceptance of defendant's offer was made within a reasonable time after its receipt, is a question of fact for the determination of a jury, and not of law for the decision of the Court. This subject is fully considered in Boyd v Peanut Company, 25 Pa. Super. Ct. 199-205.

The motion for judgment for want of a sufficient affidavit of defense must, therefore, be refused. But there is another sufficient reason why judgment could not be granted for the lump sum of damages claimed in this case, viz; $74.20. The only item stated in sufficiently specific form in the plaintiff's statement to make it recoverable, is that of $2.50, for one-half of the expenses of procuring the bond required by the defendant.

The defendant's general denial that the plaintiff has suffered the damages claimed in the statement is, therefore, suficient to put plaintiff to specific proofs of the items of its claim at the trial; Robertson v. International Textbook Co., 27 Dist. Rep. 18.

Anicipated profits are not always recoverable as damages for the breach of a contract and this statement is obviously not specific enough to show that the plaintiff is entitled to recover profits or to show the items which constitute the lumping sum demanded.

Having failed to show clearly and unquestionably to what items of damage or profits it may be entitled, in this case, that question mnst necessarily be referred to a jury.

The defendant cannot be expected to deny in detail these matters connected with plaintiff's business of which it can have no personal knowledge.

The plaintiff's motion for judgment for want of a sufficient affidavit of defense is overruled and refused.

C. P. of Schuylkill Co.

Sitler's Appeal

Appeal from School Auditor's Report—Vacancy—Appointment—Sureties.

An appeal from the report of school auditors will not be sustained upon the ground that the Court appointed another collector and gave him the duplicates; such appointment will not relieve the sureties on the former collector's bond.

J. O. Ulrich for appeal.

A. L. Shay, contra.

December 10th, 1917. KOCH, J.—The appeal in this case was filed by Clinton E. Sitler, collector of taxes in the Borough of Tamaqua, who, having filed a proper bond, was entitled to collect the taxes levied and assessed in said school district for the year 1915. The auditors found that at the time of this audit there was a balance of $13,771.29 owing to the school district by said Sitler on the tax duplicate for the year 1915. The report of the auditors of the said school district (which is of the third class) for the year ending the first Monday of July, 1916, was filed on the 29th day of August, 1916, and this appeal was filed on the 21st day of September, 1916.

The school district, by its attorney, moved the court on the 22nd day of December, 1916, to strike off the appeal, the principal reasons for the motion being, that the appellant "did not present his claim before the said auditors when they sat to settle his accounts;" that "the appellant filed no exceptions to the findings of the auditors, although the appeal was taken in September, 1916;" and that appellant failed to take

testimony. No testimony was taken in support of the reasons assigned on the motion to quash. The appellant, on the same day, to wit, December 22nd, 1916, filed an affidavit setting forth the reasons why he appealed from the auditor's report. An inspection of a statement of the account by the auditors attached to the appeal shows that "from the above (balance) there are to be deducted commissions and exonerations at settlement of duplicate." In view of this later fact, we disposed of the motion to quash on the 29th of January, 1917, and directed "that the testimony necessary to enable us to decide" what the true balance due to the school district is, "be taken without delay and submitted to us with the entire record in the case." But, without taking testimony, the parties to this controversy have filed certain affidavits and we are now asked to dispose of this controversy on those affidavits. The appellant filed three and the defendant filed two, as answers. Reference to said affidavits enables us to state the following facts. Sitler was elected Collector of Taxes sometime prior to the year 1913; that he was in default upon the duplicate for the year 1913, and, being so in default, left the Borough of Tamaqua in September, 1915, and went to Oregon, where he was subsequently apprehended on the charge of embezzlement, was brought back to this county, tried, convicted and sentenced in our Court of Quarter Sessions, and the said sentence was affirmed by the Superior Court. After the appellant absconded, nine of his bondsment petitioned the court on the first day of November, 1915, to appoint George M. Krell, one of their number, to the office of tax collector for said borough to fill the vacancy apparently caused by Sitler's absconding. George M. Krell was appointed in accordance with the prayer of the petition. The respondent was brought back to Tamaqua in December, 1915. As already stated, Sitler was given the duplicate for the year 1915. The amount of taxes therein levied and assessed is $49,836.75.

Before Sitler absconded, he paid over to the school treasurer, $29,347.24 on account of said duplicate. His bondsmen later paid $5600 on account of said duplicate and the said George M. Krell, who had been appointed as above stated, paid over $3321.03, or making a total of $38,298.27. Allowing five per cent. for commissions, would be equal to one-nineteenth of the amount received by the school district or $2014.12, which added to the amount received by the school district makes the sum of $40,282.39, or $9554.36 less than the face of the duplicate. The appeal will, therefore, be sustained as to the difference between $13,771.20 stated by the auditors as "balance due school district" and $9554.36, which difference is $4216.84. The appellant claims something should be allowed him by way of exonerations and, perhaps, something should be so allowed, but he has not taken the necessary steps to obtain the allowance. Having failed to avail himself of all opportunities to have the amount of exonerations, if any, ascertained and allowed in the proper way, we are not required to make up for lack of his dil gence and to guess at the amonnt.

Whtn Sitler was an absconder in the west and Krell, one of his bondsmen, was appointed collector of taxes, the latter applied for a writ of mandamus to compel delivery of the duplicate to him, the same having been in charge of Sitler's brother as his deputy. The deputy delivered possession of the duplicate, etc. In the writer's opinion, the appointment of Krell was made without proper legal authority (see 109 March Term, 1916), and that opinion was expressed in such a way as appellant cannot claim ignorance of it. He has rested on his oars ever since the appointment and has allowed matters to remain in status quo and now tries to make argument out of his default and neglect in permitting the duplicate to remain in Krell's hands for over two years. He claims he is unable to make settlement of the duplicate until he has possession of the same and says "All proceedings upon this appeal should be postponed until such time as the appellant regains possession of his books and papers and has time to make the proper collection, examination, additions, exonerations and report." He cannot complain that we have not been patient and waited now long enough. We will, therefore, pass over the points based upon these facts.

The appellant also claims that the auditors were remiss in making the audit. They, like every other officer, are presumed to do their duty, and, in the absence of evidence that they have not done it, the presumption will stand that they have performed it. "Such auditors shall begin their duties on the fiast Monday of July each year and promptly audit the accounts of the school district for which they were appointed,"

etc.; Section 2620 School Code. Presumably, they met at the time stated and it was the duty of the appellant to know this fact and to govern himself accordingly.

In an affidavit, purporting to have been made by the appellant on October 15th, 1917, and marked filed October 14th, 1917, he avers, "2. That the deponent furnished a bond to said school district of the Borough of Tamaqua, in the sum of $40,000, conditioned that he 'shall well and truly collect and pay over or account for, according to law, the whole amount of taxes charged and assessed in the duplicate which shall be delivered to him,'" and, "11. That the deponent has paid the school district treasurer in taxes collected by himself, the said George M. Krell, the sureties upon his bond and in commissions and exonerations, the total sum of $40,090.00 which is in full satisfaction of his bond of $40,000.00."

In view of the second paragraph just quoted, it surpasses our understanding why the eleventh paragraph, as quoted, should appear in the affidavit. If the amount of the bond is $40,000.00 and the condition thereof is that Sitler shall "collect and pay over and account for * * * the whole amount of taxes charged and assessed in the duplicate" which amount is $49,836.75, I cannot understand the mental attitude of one who will swear that the condition is met, when $9,554.36 less than the whole amount is not paid over or accounted for.

Sitler has been allowed full opportunity to enable us to do full justice to him in the premises but he has failed to help us, and the school district badly needs all the money that is due to it and is entitled to judgment.

Judgment is entered for the sum of $9554.36 in favor of the school district of the Borough of Tamaqua and against Clinton E. Sitler, the appellant.

Disposal of Goods to Defraud Creditors —Sufficiency of Indictment.—An indictment under the Act of April 22, 1913, P. L. 242, for removing, concealing, secreting and disposing of goods of the defendant with intent to prevent them from being levied when under execution and to defraud his creditors, is not defective because it does not expressly allege that the defendant had any creditors.—*Com. v. Somerson et al.*, (Lancaster Q. S.) 35 Lancaster Law Review 118.

QUARTER SESSIONS

Q. S. of Schuylkill Co.

Com. v. Walburn.

Desertion and Non-Support—Support of Minor Child — Divorce — Stepfather — Liability of Father.

A husband remains liable for the support of his minor children where he and his wife voluntarily separate and he consents to the children living with the mother, or where the wife leaves him for good cause. But it is otherwise where the wife leaves without cause, taking the children with her.

The assumed relation of father by a stepfather entitled him, on the one hand, to the services of his stepchildren and entitles them, on the other, to their support and education without remuneration. But a stepfather is under no legal obligation to support a stepchild after the death of the mother.

A grandparent may maintain a prosecution for the support of a grandchild against its father, where the father had obtained a divorce from its mother.

Non-support.

M. H. Spicker for plaintiff.

Roscoe R. Koch for defendant.

September 22, 1917. KOCH, J.—The prosecution in this case is based upon the information of Mary Miller, the grandmother of Margaret Walburn, aged four years, a minor child of the defendant. The child's mother is a daughter of said Mary Miller. Mr. and Mrs. Walburn were married in December, 1911, and Margaret was born in May, 1913. The Walburns did not get along very well together, owing to the husband's suspicions of his wife's infidelity and he left her in September, 1912. She prosecuted him for non-support in 1914, and at the May Sessions of that year, we directed him to pay to his wife the sum of eight dollars per month, intended to be for the support of the child. In June, 1914, the defendant began proceedings in divorce on the ground of his wife's adultery and obtained a decree of divorce in October, 1914. The divorced wife married again about five weeks ago, and her child, Margaret, has been living with its grandmother, the prosecutrix, ever since. The defendant does not want to support the child, because he claims he is not its father, and also because its mother has married again and has had control and custody of the child from the date of its birth.

A child having been begotten and born in lawful wedlock is presumed to be legitimate and no sufficient evidence to overcome that presumption was made to appear in this case. The statutory law of this state makes it obligatory upon parents to support their minor children, and it also provides the means of compelling a husband and father to support his wife and minor children. Primarily, the duty of supporting, maintaining and educating children rests upon the father; and, during the lifetime of the father, the mother is not bound to support the children; 29 Cyc. 1606; Henkel's Estate, 13 Superior Court 337-343.

A husband remains liable for the support of his minor children where he and his wife voluntarily separate and he consents to the children living with the mother, or where the wife leaves him for good cause. But it is otherwise where the wife leaves without cause, taking the children with her; 29 Cyc. 1607.

In this case, the child is rather unfortunate, for it virtually now stands deserted by both of its parents, and we cannot compel its stepfather to support it. Had the stepfather admitted Margaret to his home when he married her mother, he might be responsible for her maintenance and support. Chancellor Kent says in the Second Volume of his "Commentaries on American Law," page 192, that, if a stepfather takes his wife's children into his own house, he in then considered as standing in loco parentis and is responsible for the maintenance and support of the child so long as it remains with him, for by that act, he holds the child out to the world as part of his own family. In Lantz v. Frey and Wife, 14 Pa. 201, "The defendant intermarried with the female plaintiff's mother, after which the child went to reside in the family of her stepfather, until she herself married. By this arrangement, the defendant stood in loco parentis, and was responsible for the maintenance and education of the child so long as she continued to reside with him; 2 Kent. Com. 192; Stone v. Carr, 3 Esp. Cas. 1; Cooper v. Martin, 4 East 76."

The assumed relation of father by a stepfather entitles him, on the one hand, to the services of his stepchildren and entitles them, on the other, to their support and education without remuneration; Duffy v. Duffy, 44 Pa. 402. A stepfather cannot recover for maintaining his stepchild unless he can prove a contract with the guardian; Ruckman's Appeal, 16 Pa. 251. In Douglas' Appeal, 82 Pa. 173, Mr. Justice Sharswood said, "The opinion of the court in Duffy v. Duffy, 8 Wright 402, is direct to the point —that when a stepfather takes his stepchildren to reside with him as one of his family, while the one cannot claim for services, the other is precluded from compensation for expenditures." But a stepfather is under no legal obligation to support a stepchild after the death of the mother; Brown's Appeal, 112 Pa. 18.

In Fitler v. Fitler, 33 Pa. 50, the wife of Fitler deserted him and took her child with her. The husband later obtained a divorce on the ground of desertion and the mother brought an action of assumpsit for money expended in supporting and maintaining the child. The father was able and willing to receive and support the child and it was held that the wife was, under the circumstances, not entitled to recover. The court said, "While she keeps it, on such grounds, she has no claim for compensation." When the divorce was granted no order was made respecting the custody of the child.

In the case before us, the child appearing to be deserted by both its parents, I have no doubt that the primary responsibility for its support, under such circumstances, now rests on the father.

The defendant is, therefore, directed to appear in open court to hear and receive whatever order the court may then conclude to make in the premises.

Road in East Manchester Township. No. 2.

Road Law—Supervisors' Neglect Attachment—Indictment.

Petitioners asked for an attachment against the township supervisors for failure to open a public road according to the width set forth in the viewers' report and fixed by the court. HELD, that an attachment will not lie.

Neither the general road laws nor the York County Act of February 17, 1860, P. L. 61, with its supplements, give any express statutory authority for the issuing of an attachment to enforce obedience to the order of the court, in road cases.

The supervisors, as such, are required to open a road as soon as practicable after the order of the court, and they have no discretion in the matter.

A delay of about fifteen months makes a clear case for the exercise of the court's auth rity for the enforcement of the order.

An indictment of the supervisors for failure to perform their duty is the proper remedy.

Road Report No. 4, April Sessions, 1916.

Petition for attachment.

K. W. Altland for petition.

Jas. G. Glessner, contra.

February 25, 1918. WANNER, P. J.—This is the petition of certain citizens of East Manchester Township, York County, Pennsylvania, praying the court to issue an attachment against E. J. Knaub, H. E. Benedick and Frank D. Shaeffer, Supervisors of said Township, to compel them to open to a width of 25 feet, a certain road in said township described in Road Report No. 4, April Sessions, 1916. Said report was filed September 1st, 1916, and the width of the road fixed at 25 feet by the Court of Quarter Sessions of York County, which issued its order to said supervisors November 6th, 1916, for the widening of said road.

The testimony shows that while the supervisors have done some work at different points along this road, it has not been opened up to the required width, although they have been repeatedly requested to do so, by the petitioners and other citizens of the Township.

It also appears that on one occasion when certain of the petitioners met the three supervisors of the Township at work on this road, and called their attention to the fact that is was not being properly opened to the with required by the order of the Court, that they were met with a profane defiance of the Court and themselves by Frank S. Sheaffer, one of said supervisors, and the declaration that the road would be opened to suit himself. This was followed soon afterward by a stoppage of the work.

The evidence on the part of the supervisors does not disclose any earnest, substantial and continued effort on their part to fully comply with the orders of the Court, nor does it show that it is impossible or impracticable to do so, if the proper means is taken to accomplish that end.

This is apparently a case in which the supervisors are disinclined to do their duty because their personal judgment does not approve of widening the road. It is needless to say that the law provides remedies for any illegal action on the part of the viewers, and for a review of the question whether or not the road should be widened, if there is objection thereto by citizens of the township. The supervisors themselves, however, are required by act of assembly of June 13th, 1836, P. L. 556, to open the road as soon as practicable, after they are ordered to do so by the Court, and they have no discretion whatever to exercise in the matter.

In this case about fifteen months have elapsed, including the whole summer season of the year 1917, without proper and effective work having been done by the supervisors upon this road.

We are clearly of the opinion that it is a case which calls for the exercise of the Court's authority, for the enforcement of this order in the interest of the public. There have been too many cases of official neglect in the past by supervisors in this County to justify any further acceptance of ordinary excuses for the same.

The remedy by attachment, however is one of doubtful authority.

The lower courts have generally held that the remedy for wilful neglect of duty on the part of the supervisors is by indictment, and not by attachment. We have found no case in which the appellate courts have ruled directly upon the question whether or not attachment would lie.

In Roaring Brook Township Road, 140 Pa. 632, the Supreme Court sustained the proceedings in the court below on other grounds where an attachment had been issued to compel the opening of a road, but in doing so, called attention to the fact that no question had been raised before it as to the power of the Court of Quarter Sessions to issue the attachment, and stated that the Court was, therefore, deciding only what was before it. The inference that may be fairly drawn from this is, that the Supreme Court desired to avoid an apparent affirmance of the attachment, as a proper process in that case.

It will be observed that neither the general road laws of the Commonwealth, nor the York County Road and Bridge Act of February 17, 1860, P. L. 61, with its supplements, give any express statutory authority for the issuing of an attachment to enforce obedience to the orders of the Court, in road cases.

We are of the opinion, therefore, that an indictment and not an attachment, is the proper remedy, and that the facts of the case as presented here, show sufficient grounds upon which to order an indictment sent up against the supervisors of this Township for culpable neglect of their official duty in not widening this road according to the order of the Court; Comth.

v. Reiter, 78 Pa. 161; Phillips v. Comth., 44 Pa. 197; Edge v. Comth. 7 Pa. 275; Comth. v. Fair, 2 North. 275; Comth. v. Meany, 8 Pa. Super. Ct. 224.

It is ordered that unless the supervisors of East Manchester Township shall, on or before the first day of the Court of Quarter Sessions of the Peace of York County to be held at York, on the 15th day of April, 1918, show to the Court, that they have properly complied with the orders of the Court in Road Report No. 4, of April Sessions, 1916, an indictment shall be sent up to the Grand Jury at said Court by the District Attorney of York County, charging the respondents in this case, as supervisors of said township, with culpable negligence and wilful non-compliance with the order of the Court of November 6th, 1916, to widen the road described in Road Report No. 4, of April Session, 1916.

ORPHANS' COURT

O. C. of Lancaster Co.

Hildebrand's Estate.

Widow's Appraisement—Inheritance Tax—Acts of June 7, 1917, and July 11, 1917.

A widow's $500 exemption claimed under Section 12 of the Fiduciaries Act of June 7, 1917, P. L. 471, is not subject to inheritance tax under the Act of July 11, 1917, P. L. 832.

Such exemption does not pass "either by will or under the intestate law." It is a wife's inchoate property right in her husband's estate which becomes complete when she "retains" it.

Appeal from appraisement of Widow's Exemption for Inheritance Tax.

J. R. Kinzer and *O. S. Schaeffer* for appellant.

M. G. Musser for appellee.

December 27, 1917. SMITH, P. J.—"For the imposition and collection of certain inheritance taxes" an enactment was approved July 11, 1917 (P. L. 832). Concisely, it provides that, "All estates * * * passing from any person * * * either by will or under the intestate laws of the Commonwealth * * * are * * * subject to the tax of two ($2) dollars on every hundred dollars of the clear value of such estate." Because of this enactment the Commonwealth of Pennsylvania contends that the five hundred dollars exemption reserved for a widow by Section 12 of the Fiduciaries Act of 1917 (P. L. 447) is subject to the tax, and to accomplish its collection has included it in the prescribed appraisement, and from which this appeal has been taken.

Exemption acts have been conceived in a spirit favorable to widows and have received an interpretation consistent with their conception; Lyman v. Byam, 38 Pa. 475; Peeble's Estate, 157 Pa. 605. Such an act creates an independent bounty, and is of no kin to one of distribution; Compher v. Compher, 25 Pa. 31; Nevin's Appeal, 47 Pa. 230; King's Appeal, 84 Pa. 345; Gilbert's Estate, 227 Pa. 648; Buckland's Estate, 239 Pa. 608.

The Commonwealth can not prevail because the inheritance tax does not authorize its action. It provides that only the "clear value" of a decedent's estate is taxable and the clear value of an estate is only that which remains after all claims against it have been paid. A widow's exemption is a "preferred claim," and, therefore, must first be met. It is a "gift of the law prompted by considerations of public policy;" Beetem & Co. v. Getz, 5 Sup. Ct. 71; Peeble's Estate, supra.

An estate that passes "either by will or under the intestate laws" is subject to the tax, but a widow's exemption is not such an estate. It does not come by either of these ways. It is neither a legacy or devise, nor an inheritance. Subject to a purchase money lien it is preferred to all claims against an estate. By asserting it the amount of it ceases to be regarded as part of a decedent's estate. Against it a decedent's creditors, legatees, devisees or distributees cannot prevail; Peeble's Estate, supra. The action of a widow properly claiming it distinguishes it as her estate; which had been held in abeyance by her husband during her life. The act says it is something which she may 'retain," thus pointedly implying ownership.

Such exemption is a wife's inchoate property right in a husband's estate, which becomes complete when as his widow she sustains her claim for it. It is not subject to the tax imposed on the estate passing from a deceased husband; therefore, the appeal is sustained and the appraisement for inheritance tax purposes is reformed by striking five hundred dollars from it Costs to be paid by the Commonwealth.

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COMMON PLEAS

Waltrick's Executor v. Hockensmith. No. 2

Contract — Consideration — Survivorship — Fraud.

Plaintiff's decedent deposited six hundred dollar payable to the order of himself or another (defendant), and received therefor a certificate of deposit. This certificate contained a proviso that the money belongs to the payees jointly, it being understood that either may withdraw on his or her individual order during their joint lives, and that any balance remaining upon the death of either shall belong to the survivor. After the death of the testator defendant presented the certificate to the bank and drew the entire amount, with interest. Plaintiff having brought suit therefor, the affidavit of defense set forth that the certificate of deposit was to be the absolute property of the defendant, subject to the condition that defendant would pay decedent's funeral expenses, and retain the balance as payment for the support and maintenance of the decedent. HELD, that a motion for judgment for want of a sufficient affidavit of defense must be overruled.

The plaintiff's statement assuming that, as the money represented by the certificate of deposit was not drawn in decedent's lifetime it became part of his estate, the effect of the qualifying clause resulted in a gift contingent on the death of the donor, and the affidavit of defense setting up a contract and a delivery of the money in decedent's lifetime as a consideration, proof will be required by the plaintiff of the matters alleged in the statement.

These conflicting theories and facts as stated by the pleadings, render it impossible for a Judge to decide from the pleadings alone.

No. 92, August Term, 1917.

Motion for judgment for want of sufficient affidavit of defense.

For the opinion of the Court on the affidavit of defense raising matters of law, see Waltrick's Executor v. Hockensmith, *supra* 115.

The Court having there directed the filing of a supplemental affidavit of defense, it was duly filed, and this motion for judgment made by plaintiff.

Cochran, Williams & Kain for motion.

F. M. Bortner, contra.

March 25th, 1918. ROSS, J.—This case was once before us on the defendant's affidavit of defence raising a point of law under the "Practice Act 1915." The defendant's contention then was overruled, and he was ordered to file a supplemental affidavit of defence. In the opinion filed in that contention, after giving a synopsis of the pleadings, we said that "the main inquiries * * * are, does the money in question belong to the estate of the decedent? And did the defendant wrongfully and unlawfully appropriate it to his own use?" The defendant duly filed his supplemental affidavit of defence.

We are now confronted with the plaintiff's motion for judgment for want of a sufficient affidavit of defence. The plaintiff's statement is as follows:

"The plaintiff, Elmer Duke, Executor of the last will of Jerry Waltrick, late of the City of York, in the County of York, and State of Pennsylvania, deceased, claims of the defendant, Harry A. Hockensmith, the sum of Six Hundred and Ten Dollars and fifty cents, ($610.50), with interest from the fifth day of March, 1917, upon a cause of action whereof the following is a statement.

FIRST. "Jerry Waltrick, being a resident of the City of York, in the County of York and State of Pennsylvania, and being the same person designated as "Jere" Waltrick in the certificate of deposit, a copy whereof is attached to this statement, died in said City of York on the third day of March, 1917, having first made his last will, dated the 20th day of July, A. D. 1916, duly probated on the 14th day of March, 1917, and recorded in the office of the Register of Wills for the County of York in Will Book, Vol. 3 &, No. 6, page 334, wherein and whereby the testator appointed the Plaintiff, Elmer Duke, the Defendant, Harry A. Hockensmith and one Guy Waltrick, executors thereof. Guy Waltrick, by renunciation duly filed in the office of the said Register of Wills, declined to assume the office and duties of executor as aforesaid and on the 10th day of April, 1917, letters testamentary upon the estate of the said decedent were duly granted by the said Register of Wills to Elmer Duke and Harry A. Hockensmith.

The Plaintiff, Elmer Duke, is a resident of the Borough of Chambersburg, in the County of Franklin and State of Pennsylvania.

The Defendant, Harry A. Hockensmith, is a resident of the City of York, in the County of York and State of Pennsylvania.

SECOND. "On the 13th day of July, 1916, Jerry Waltrick deposited his own moneys to the amount of Six Hundred ($600.00) Dollars, in the Western National Bank, a Corporation of the United States of America, doing a general banking business in the City of York, in the County of York aforesaid, and then and there received from the said Western National Bank a certificate of deposit, a true copy whereof and of all the endorsements thereon is attached to this statement and made part hereof.

THIRD. "After the death of Jerry Waltrick and before the probate of his last will, on, or about the 5th day of March, 1917, at the City of York, in the County of York and State of Pennsylvania, the defendant, Harry A. Hockensmith, presented the within mentioned certificate of deposit at the banking house of the said Western National Bank and then and there wrongfully and unlawfully received from the said bank the sum due upon the said certificate, to wit, Six Hundred ($600.00) Dollars, deposited and Ten ($10.50) Dollars and Fifty Cents, interest, thereon, said sum of money being then and there the property of the estate of Jerry Waltrick, deceased, and not the property of the said Harry A. Hockensmith, and thereafter wrongfully and unlawfully converted the said sum of money to the use of him, the said Harry A. Hockensmith, and though often requested to pay the said sum to the plaintiff, he always, and still does, wrongfully and unlawfully refuse so to do.

"Wherefore the plaintiff demands judgment against the defendant for the said sum of Six Hundred and Ten Dollars and Fifty Cents ($610.50), with interest thereon from the 5th day of March, 1917, and costs of suit."

[COPY]

WESTERN NATIONAL BANK.

CERTIFICATE OF DEPOSIT.

York, Pa., July 13, 1916.

No. 42191.

The amount deposited in this account belongs to the payees jointly it being understood that either may withdraw on his or her individual order during their joint lives, and that any balance remaining upon the death of either shall belong to the survivor.

Jere Waltrick.....has deposited in this Bank.....Six Hundred Dollars.....Dollars.
100

Payable to the order of self or Harry Hockensmith on return of this certificate properly endorsed.. $600 00

10.50 CHAS. H. EMIG, for Cashier.

Thirty days notice must be given for the withdrawal of this deposit.

Interest 3 per cent. per annum if left 6 months.

Interest 3 per cent. per annum if left 12 months.

Not subject to check.

(Endorsed) HARRY HOCKENSMITH.

The affidavit of defence admits the matters set forth in paragraphs one and two of the statement but denies the matters set forth in the third paragraph, as follows:

"THIRD: The Defendant denies the matters set forth in Paragraph "Third" of the Plaintiff's statement, and for answer thereto specifically avers:

"(a) That Jerry Waltrick, the decedent mentioned in the plaintiff's statement, on the 13th day of July, 1916, requested the defendant to accompany him to the place of business of the Western National Bank in the City of York, Pa., the corporation mentioned in the Plaintiff's statement, for the purpose of providing suitable compensation to him, the defendant, for the care and support which he, the defendant, had provided for him, the said Jerry Waltrick, continuously throughout the previous period of three or more years, during which the said Jerry Waltrick had resided with the defendant.

"(b) That, the defendant as requested accompanied the said Jerry Waltrick to the Banking house aforesaid, whereupon the said Jerry Waltrick proposed to deposit the sum of Six Hundred Dollars with said Bank on condition that the said Defendant was to have the absolute ownership of said fund, subject to the provision that the Defendant was to pay the funeral expenses of the said Jerry Waltrick upon the happening of his death.

"(c) That the said Jerry Waltrick did deposit and the said Bank thereupon received from the said Jerry Waltrick the aforesaid deposit of Six Hundred Dollars and issued

its certificate of deposit for said sum, payable to the order of himself, the said Jerry Waltrick, or Harry Hockensmith, the defendant, upon the terms which appear by the copy of said certificate of deposit set forth in Plaintiff's statement.

"(d) That immediately after the said Bank had received said deposit and issued said certificate of deposit, in furtherance of the said Jerry Waltrick's intention to pay the defendant for the care and support, which he, the defendant, had accorded the said Jerry Waltrick, and for his funeral expenses, which he, the defendant, should subsequently, upon the death of the said Harry Waltrick, defray he, the said Jerry Waltrick, delivered to the defendant, said certificate of deposit as and for the defendant's own property.

"(e) That the defendant thereupon on said 13th day of July, 1916, received said certificate of deposit from said Jerry Waltrick, for the purposes above mentioned and held the same until the time of the death of said Jerry Waltrick, which occured on the third day of March, 1917, and thereafter on or about March 5th, 1917, he presented said certificate of deposit to said Western National Bank for payment and received the amount due thereon, to wit: Six Hundred Dollars and Ten Dollars and Fifty Cents interest.

"(f) That the defendant applied so much of said proceeds as was necessary to pay the funeral expenses of the said Jerry Waltrick, to wit, the sum of One Hundred and Seventy Dollars and Twenty-eight Cents and the remainder thereof he applied towards the pay-of the care and support which he, the defendant, had theretofore furnished to the said Jerry Waltrick, during a previous period of about four years, which was in accordance with the agreement between the said Jerry Waltrick and the defendant, and agreeably to the delivery of said certificate of deposit to the defendant.

"(g) That said Jerry Waltrick was partially blind and required unusual care and attention and said services and his boarding and lodging for a period of about four years during which the said Jerry Waltrick lived continously with the defendant, and during which the said services, boarding and lodging were furnished to the said Jerry Waltrick, without interruption, were of great value, to wit, of the value of about One Thousand Dollars, and for which services, boarding and lodging, the defendant received no other compensation than the aforesaid certificate of deposit or the proceeds thereof.

"(h) The Defendant specifically denies as averred by the Plaintiff that he wrongfully and unlawfully received from said Bank the sum due on said certificate of deposit, to wit, Six Hundred Dollars deposited and Ten Dollars and Fifty Cents interest thereon.

"(i) The Defendant denies that said sum of money was then and there the property of the estate of Jerry Waltrick, deceased, and not the property of said Defendant, but on the other hand avers that said certificate of deposit and the money due thereon was by reason of the terms of the certificate itself and delivery thereof to the defendant, both by the bank and the said Jerry Waltrick, the property of him, the defendant.

"(j) The Defendant denies that he wrongfully and unlawfully converted said snms of money to his own use, but affirmatively avers that he applied the necessary part thereof, to wit, the sum of One Hundred and Seventy Dollars and Twenty-eight cents to the payment of the funeral expenses of the said Jerry Waltrick as he had previously agreed, and the remainder thereof he applied on account of the services, boarding and lodging, which he had previously furnished to the said Jerry Waltrick, as agreed upon between the said Jerry Waltrick and the defendant, as more particularly above set forth."

From the pleadings must be observed, that this controversy is between two executors of the same estate; there is nothing before us to indicate that any rights of creditors or heirs of the deceased depend in any way upon the outcome of the present contention.

The direct charge in the plaintiff's statement, is a charge of fraud. There is nothing in the proceedings which would induce the Court to believe that the plaintiff as executor of the decedent's estate has any better rights to the custody of the money than the defendant has as such trustee.

The plaintiff says in his statement that the defendant "wrongfully and unlawfully received from the bank the sum due upon the said certificate, * * * said sum of money being then and there the property of the estate of Jerry Waltrick, deceased, and not the property of the said Harry A. Hockensmith, and thereafter wrongfully and unlawfully converted the said sum of money to the use of him, the said Harry A. Hockensmith."

That allegation is not made clear by anything else in the statement and could only be regarded as an assumption or conclusion of the plaintiff if it were not for the light which the affidavit of defense throws upon it. The defendant's supplemental affidavit of defense says, that, "The said Jerry Waltrick proposed to deposit the sum of six hundred dollars with the said bank on condition that the said defendant was to have the absolute ownership of the said fund, subject to the provision that the defendant was to pay the funeral expenses of the said Jerry Waltrick upon the happening of his death.

"That the said Jerry Waltrick did deposit and the said bank thereupon received from the said Jerry Waltrick the aforesaid deposit * * * and issued its certificate of deposit for said sum, payable to the order of himself, * * * or Harry A. Hockensmith, * * * upon the terms which appear by the copy of said certificate of deposit set forth in plaintiff's statement.

"That immediately after the said bank had received said deposit and issued said certificate of deposit, * * * he, the said Jerry Waltrick, delivered to the defendant the said certificate of deposit as and for the defendant's own property."

The plaintiff's contention seems to be based upon the assumption that because the money represented by the certificate of deposit was not drawn out of the bank in the lifetime of the decedent, it thereupon became a part of the decedent's estate; and construing the language of the qualifying clause which appears on the certificate of deposit to suit his own theory, concludes that the effect of the clause resulted in a gift contingent on the death of the donor.

On the other hand the defendant clearly states a contract between decedent and himself in the lifetime of the decedent.

A delivery of the money in his lifetime as a consideration.

These conflicting theories and facts as stated by the pleadings, render it impossible for a Judge to decide from the pleadings alone. Technically, under the plaintiff's theory, the conditions as they are now presented, might be made, by subsequent investigation and legal testimony, to establish a gift conditioned on the death of the donor, with no delivery in the lifetime; but that, under the affidavit of defense, is in dispute.

"A gift in the lifetime of the donor may be found by the triers of fact, and may be proved by the declarations of the donor; Leith v. Diamond Nat. Bank, 234 Pa. 557, L. R. A. 1916 E, (note III, page 291).

It is plain, that the affidavit of defence will require proof by the plaintiff of the matters alleged in his statement.

The motion for judgment for want of a sufficient affidavit of defence is, therefore, overruled.

C. P. of Schuylkill Co.

Com. ex rel. v. Sitler.

Tax Collector—Vacancy—Appointment of Successor—Release of Surety.

When the court appoints one to fill an alleged vacancy in the office of tax collector and lacks such power the appointment so made will not oust the elected collector nor release the sureties on his bond.

Rule to set aside fi. fa.

J. O. Ulrich for rule.

A. L. Shay, contra.

December 10, 1917. KOCH, J.—Judgment was entered at No. 328, May Term, 1916, on a bond given by Clinton E. Sitler, collector of taxes of the Borough of Tamaqua, and a writ of fi. fa. to No. 10, September Term, 1917, was issued on said judgment to collect from Sitler and his bondsmen $1379.17 due to the Borough of Tamaqua upon the tax duplicate issued to said C. E. Sitler in the year 1913, and another writ of fi. fa. was issued to No. 11, September Term, 1917, to collect $3779.19 due to the County of Schuylkill for taxes due to it on the same duplicate. W. A. Sitler, one of the sureties on the bond, now asks us to set aside these executions. C. E. Sitler, by virtue of his office and the placing of said duplicate in his hands, was authorized to collect the taxes levied and assessed for borough and county purposes in the year 1913. In the neighborhood of two years and upwards after Sitler got said duplicate, he left for parts unknown and was later charged with embezzlement, located in Oregon, arrested, brought back, indicted, tried, convicted and sentenced to jail. In his absence, and, before his apprehension, his bondsmen petitioned our court to appoint one of their number to fill the office of collector of taxes in said borough, and one George M. Krell was appointed in September, 1915. Sitler was also authorized to collect the taxes levied and assessed for the years 1914 and 1915. When he left for

the west, his brother remained as his deputy in charge of the office and this court had no authority whatever to appoint Krell under the circumstances. The petitioner, who is the father of C. E. Sitler, now seeks to avoid his own liability on the bond, claiming that Krell's appointment released him and all the other sureties on the bond. Since neither the court nor any member of it had any authority whatever to appoint Krell and thereby virtually oust Sitler, such appointment would not release the sureties on Sitler's bond. Krell, being unlawfully in office, cannot reap the benefits of it and his work may prove fruitless to him, if Sitler avails himself of his legal rights in the premises. The taxes stated in his duplicate for 1913 should have been fully accounted for by Sitler long before he absconded. Reports of auditors are conclusive, unless appealed from; Commonwealth v. Keenan, 31 Superior Court 586. The executions were issued upon proper certification of the amounts due and no writs of scire facias were needed to ascertain the amounts.

The rule is discharged.

City Bank v. Reiker.

Collateral Security—Liability of Holder—Depreciation.

Plaintiff was the holder of two notes against defendant, as collateral security for which it held two mortgages against a third party, of which defendant was the legal owner, and which mortgages, by reason of the depreciation of the land which they covered, were worthless. Defendant offered evidence to show a notice to plaintiff by him, to foreclose the mortgages, and claimed a loss, by reason of failure to make such foreclosures, in excess of the amount due on the notes. The jury found for the defendant. On a motion for judgment for plaintiff *n. o. v.*, HELD, that the judgment must be refused.

The disputed questions of fact (1) whether notice to foreclose had actually been given; (2) whether or not the plaintiff had afterwards been guilty of culpable negligenee in not foreclosing; (3) whether plaintiff's negligence was the direct cause of any loss to the defendant—were all necessarily left to the jury to decide upon the conflicting evidence on those subjects.

The Court instructed the jury "If the jury find that plaintiff (after notice to foreclose) was guilty of supine negligence in not doing so, and this negligence caused a loss to the defendant, plaintiff would be liable to him for such loss." HELD, not to be error.

An instruction that the bank could not be held liable under any and all circumstances for failure to foreclose these mortgages, but would be held only to the exercise of such care of the collateral as a man of ordinary prudence would give to important affairs of his own, was as favorable to the plaintiff as the rules of law would permit.

No. 4, October Term, 1917.

Motions for new trial and for judgment *non obstante veredicto.*

D. H. Yost and *Niles & Neff* for motion.

S. B. Meisenhelder and *Jas. G. Glessner*, contra.

April 8th, 1918. WANNER, P. J.—It was admitted at the trial of this case that the amount of principal and interest due on the notes in suit was $9805.27. Against this defendant claimed a set-off of $3041.36, said sum being the proceeds of sale by the plaintiff, of thirty-three shares of City Bank stock which he alleged that the plaintiff had held as collateral to secure payment of one of the notes in suit, but which the Bank contended was a general collateral for all the notes which it held against the defendant.

The defense made to the remainder of the plaintiff's claim was, that the defendant on April 6th, June 28th, and August 6th, 1916, had notified the plaintiff's cashier to foreclose two mortgages for $7000.00 and $10,000.00 respectively, which were then held by it as collateral security for the notes in suit, and that by reason of the plaintiff's neglect to do so, a total loss of their value had been suffered by the defendant, because of the subsequent depreciation in the value of the real estate upon which said mortgages were liens. It was admitted that at the time of the trial the uncollected mortgages were still in the possession of the plaintiff.

The disputed questions of fact (1) whether such notice to foreclose had actually been given, (2) whether or not the plaintiff had afterwards been guilty of culpable negligence in not foreclosing the mortgages, (3) whether the plaintiff's negligence was the direct cause of any loss to the defendant, were all necessarily left to the jury to decide upon the conflicting evidence in the case, on those subjects.

The verdict of the jury was for the defendant. The plaintiff now moves for a

new trial and for judgment *non obstante veredicto* against the defendant.

The only errors assigned in support of these motions which were insisted upon at the argument, were the Court's answers to the plaintiff's points, and its instructions to the jury to the effect, that if the jury found from the evidence that the plaintiff was guilty of supine negligence in not foreclosing the collateral mortgages as directed to do by the defendant, that it would be responsible for any loss directly resulting therefrom to him.

The plaintiff's third and fourth points which were general requests for binding instructions in favor of the plaintiff, were refused because of the conflicting testimony on the material questions of fact already referred to.

The plaintiff's first and second points covering the question of negligence in this case, with the Court's answers thereto, were as follows:

"I. A creditor who holds collateral for a debt is not bound upon request of the debtor to sell or realize on the collateral. His refusal to do so is not per se negligence. The debtor's remedy is to pay the note, and then he can enforce return of the collateral."

"Answer. This point is refused as written. Though plaintiff's refusal to realize on the collateral at once is not negligence per se, if the jury find from the evidence that it was afterward guilty of supine negligence in not doing so, and this negligence caused a loss to the defendant, plaintiff would be liable to him for such loss.

"II. Giving to the testimony of the defendant all possible weight, his only claim regarding the mortgages assigned by him as collateral August 20th, 1915, is, that on three occasions, to wit; April 6th, June 28th, and August 6th, 1916, he stated to the plaintiff's cashier that he desired the plaintiff to have them foreclosed, this did not oblige the plaintiff to comply, or make it responsible for any loss which might arise by reason of alleged decrease in market value of the mortgaged land after such request."

"Answer. This point is refused as written. If the plaintiff, after receiving said alleged notices, was guilty of supine negligence in not foreclosing the mortgage, or selling the same, and the direct result of that negligence was a loss to the defendant, the plaintiff would be responsible for such loss."

The instructions given to the jury by the Court in its general charge, prior to its answers to these points, were to the same effect, and seem to be well sustained by numerous authorities.

In Hanna v. Holton, 78 Pa. 334, it was specially held that where a collateral is lost by the insolvency of the debtor, through the supine negligence of the creditor, that the latter must account for the loss to his own debtor. Agnew, J., said: "By the assignment a privity in contract is established, which invests the assignee with the ownership of the collateral, for all purposes of dominion over the debt assigned. He alone is empowered to receive the money to be paid upon it, and to control it in order to protect his right under the assignment. This is the ground of the creditor's liability for the collateral, as stated by Tilghman, C. J., in Lyon v. Huntingdon Bank, 12 S. & R. 68; and also by the court in Beale v. The Bank, 5 Watts 530. It is, therefore, settled in this state that where the collateral is lost by the insolvency of the debtor in the collateral instrument, through the supine negligence of the creditor, he must account for the loss to his own debtor, who invested him with its entire control; Miller v. Gettysburg Bank, 8 Watts 192; Bank U. S. v. Peabody, 8 Harris 454; Dyott's Estate, 2 W. & S. 490; Chambersburg Inc. Co. v. Smith, 1 Jones 120; Sellers et al. v. Jones, 10 Harris 427; Lishy v. O'Brien, 4 Watts 141; Muirhead v. Kirkpatrick, 9 Harris 237; Ins. Co. v. Marr, 10 Wright 504."

The latest decisions of the appellate courts on this subject affirming and following the above cited cases are Bank of Commerce v. Fisher, 65 Pa. Super. 369 and Farmers Nat. Bank of Beaver Falls v. Nelson, 255 Pa. 455. In the latter the Court, after reviewing previous auhorities concludes "Hence it is clear, we think, that the creditor must take all necessary legal steps to preserve the collateral, and if it is lost by his negligence he is responsible to his debtor." "The holder of collateral security," says the Court in Muirhead v. Kirkpatrick, 21 Pa. 237, "is bound to preserve it, or collect it and apply it for the benefit of its assignor. His duties in respect to it are active. He is to employ reasonable diligence in collecting the

money on the security aud applying it to the principal debt."

See also Miller v. Gettysburg Bank, 8 Watts 192; Scott v. 1st Nat. Bank of Tulsa, 82 S. W. 751-5; Omaha Nat. Bank v. Kiper, 82 N. W. 102; Beale v. The Bank, 5 Watts 529; McQueen's Appeal, 104 Pa. 595; Warbutron v. Trust Co., of America, 165 Fed. 974-977.

The Court in its general charge instructed the jury that the plaintiff was not necessarily bound to foreclose the mortgages immediately upon receiving notice to do so. That failure to do so might be owing to conditions beyond the control of the Bank, which could not be imputed to it as carelessness. That the circumstances might be such that the Bank would lose by doing so, and that there might be good reason to believe that the money might be made by delaying action. Also that depreciation in value of the property might be sudden, or from causes which no one could foresee. For these reasons the Bank could not be held liable under any and all circumstances for failure to foreclose these mortgages, but would be held only to the exercise of such care of the collateral as a man of ordinary prudence would give to important affairs of his own. We are of the opinion that these instructions were as favorable to the plaintiff as the established rules of law would permit the Court to give.

The general assignment that the Court erred in its rulings on the admission and rejection of evidence at the trial of the case, was abandoned at the argument and no specific rulings were excepted to at all.

Only the Court's answers to the plaintiff's third and fourth points refusing, binding instructions, were excepted to before the jury retired, but we have also reviewed the answers to the plaintiff's 1st and 2nd points, because they involve the same questions as to plaintiff's liability for negligence, as does the portion of the charge which was excepted to.

The exception to the form of the verdict was not pressed in court or argued by plaintiff's counsel, probably because no exception had been taken to the form of the verdict at the time of its rendition and recording,

The plaintiff's motions for a new trial, and for judgment *non obstante veredicto* are overruled and refused.

C. P. of Montgomery Co.

Alleva v. Gravinese et al.

Garnishee — Attorney's Compensation — Laches.

Garnishee petitioned the Court to open judgment entered against him and to let him in for a defense, alleging ignorance of his rights and liabilities.

The facts show that the garnishee was personally served with interrogatories, that he had employed counsel, who notified the Justice that he represented the garnishee, and if garnishee failed to recompense counsel for services to be rendered, he cannot now complain of the position in which he has voluntarily placed himself. The garnishee's rights would have been protected by appeal or certiorari, but a period of more than eight months having elapsed from the time of the entry of the judgment and the transcript being filed in the Court of Common Pleas, the application to open judgment must be refused.

Petition to open judgment.

J. Ambler Williams for plaintiff.

Maxwell Strawbridge for defendant.

November 23, 1917. SWARTZ, P. J.— Judgment was obtained against the defendant, Guiseppe or Joseph Gravinese, before the magistrate, Casper Puche, for the sum of $223.09. Execution was issued on November 28, 1916, and the constable returned "no goods."

On December 1, 1916, an attachment-execution was issued against Antonio Di Nanno, as Garnishee. Interrogatories were filed and personal service was made on the defendant and the garnishee,

On the day fixed for a hearing the defendant and the garnishee failed to appear and no answers were filed to the said interrogatories. On August 8th, 1916, the Justice gave judgment against the Garnishee, "in default for not answering the interrogatories and also did not appear." The judgment was entered for the same amount theretofore given against the defendant.

On August 14, 1917, more than eight months after the judgment was entered, a transcript was filed in the Court of Common Pleas for the purpose of obtaining liens against the real estate of the defendant and the Garnishee.

During all this intervening time no appeal or certiorari was taken to the proceedings before the justice.

In the application to open the judgment, no exception or objection is made to the regularity of the proceedings had before the justice.

The reasons given, in support of the application to open the judgment, are stated as follows:

"Your petitioner believes, that since he had no dealings with Guiseppe Gravinese, and being ignorant of his rights and liabilities, in the premises, and relying upon the statement of the constable, feels that the judgment of record is an injustice, as against him, and, therefore, prays your Honorable Court to open said judgment and let your petitioner, as Garnishee aforesaid, into a defense."

When the attachment and a copy of the interrogatories were served on the Garnishee, the Justice who speaks the Italian language, accompanied the constable. The justice explained the proceedings and the interrogatories to the Garnishee in Italian. When the latter stated he had no business dealings with the defendant, Joseph Gravinese, the justice answered, that is all right but you should employ a lawyer to protect your interests.

The Garnishee accordingly did employ an attorney in the matter, before the return day of the writ and b fore the time for the filing of answers to the interrogatories had expired.

On the day before the hearing said attorney wrote a very unusual letter to the justice. It reads:

"I represent Mr. Antonio Mannocchio, Guiseppe Mannocchio and Antonio Di Nanno, upon whom you served certain interrogatories which you desire answered. These people are perpectly willing to do this, providing you pay their attorney for the filing of said interrogatories."

Afterwards a fee of ten dollars was demanded.

After this correspondence, it is useless to talk about the ignorance of the garnishee's rights and liabilities. He employed counsel to protect him in his rights. If he failed to pay the attorney for the services he was to render, he has no one to blame but himself for his default in not answering the interrogatories. Why should the justice be called upon to pay counsel fees?

If the Garnishee had a good defense because he was not in any way indebted to the defendant then it was his duty to make that defense before the justice. After the judgment was entered against him his only remedy was an appeal or a certiorari of the proceedings. A judgment entered in the Court of Common Pleas, upon a transcript of the justice, for the purpose of obtaining a lien, can not be opened by an application to that Court. This ruling is well established by numerous decisions of our Supreme Court; Lacock v. White, 19 Pa. 495; Boyd v. Miller, 52 Pa. 431; Littser v. Littser, 151 Pa. 474. The same ruling is found in Doerr v. Graybill, 24 Pa. Superior Ct. 321.

That the same rule of law applies to a judgment entered by a justice against a garnishee is shown in Boland v. Spitz, 153 Pa. 590. In that case judgment was entered against the garnishee by the alderman, The Court said:

"That judgment was never challenged by appeal, certiorari or otherwise and had, therefore, become as final and conclusive, on all the parties thereto, as the judgment of any Court of competent jurisdiction. * * * * * His only remedy was by appeal or certiorari."

Even if we could entertain jurisdiction, in the Common Pleas, to open the judgment we could not sustain the contention, that the garnishee was ignorant of his rights, when the evidence shows he retained counsel in ample time, to protect these rights.

The other contention of the garnishee, that he had no money in his hands due and payable to the defendant, is also contradicted by the evidence. We are of opinion, that the weight of the evidence clearly shows that there was a fraudulent combination to misrepresent the true facts as to the relations between the defendant and the garnishee. The disinterested witnesses show that Joseph Gravinese was the contractor to build the houses for Di Nanno, and that Philip Gravinese was substituted as the contractor to defeat the payment of the plaintiff's claim. The only disinterested evidence apparently in conflict with this concluson, is that of Mr. Moll who kept the accounts of the Norristown Brick Company, but when his testimony is examined, he fails to give any warrant for charging the bricks to Philip Gravinese. All his dealings beginning with the quotation of the price for the bricks, were with Joseph Gravinese.

It is, however, not necessary to base our action upon the merits of this branch of the garnishee's contentention. For the reasons already given, we can not disturb the judgment, under the application now before us.

The rule to show cause is discharged, and the application to open the judgment is refused.

Tyson v. Tyson.

Married Woman—Sale of Property Under Execution Against Husband—Punitive Damages.

Plaintiff sued to recover damages for the sale of her property, under an execution against her husband. At the trial the evidence showing the purchase of the property by the plaintiff, due notice of such ownership given to the defendant and ample opportunity for defendant to ascertain the truth of such claim before the day of sale, the jury found for the plaintiff the amount for which the mules were sold at the sale, interest and fifty dollars damages. On a motion for new trial, on the ground that there was no evidence to support the verdict for punitive damages, HELD, that the motion must be refused.

There was admitted in evidence the note given by plaintiff at the time she bought the mules, receipt for the payment of the same and statements of the party from whom she bought the mules. HELD, not to be grounds for a new trial.

These papers and statements were not offered as complete and conclusive evidence of ownership, but as corroborative of plaintiff's direct testimony on the subject.

In order to decide with accuracy upon the character of any phenomenon or transaction we must know all the facts of which it consists, and all the circumstances that are truly connected with, and influence it.

No. 46, April Term, 1917.

Action of trespass.

Motion for new trial.

A. W. Hermann for motion.

Niles & Neff, contra.

April 8, 1918. Ross, J.—By the pleadings the plaintiff avers and the defendant admits that, 1—the plaintiff was, on December 2nd, 1915, a married woman, the wife of F. L. Tyson. 2. On or about December 2nd, 1915, the defendant caused an execution to be issued upon a judgment which he had obtained before a Justice of the Peace in the Borough of Red Lion, York county, against F. L. Tyson, and on December 6th, 1915, he directed W. E. Straley, a constable, to levy upon and take under said execution, on December 13th, 1915, two pairs of black mules and one single mule, and executed and delivered to said constable, a bond in the sum of $800.00 to indemnify the said constable, &c., &c.

3. On December 18th, 1915, under said execution, two pairs of black mules and one single mule, were were sold as the property of F. L. Tyson, the husband of the plaintiff, and the defendant received the proceeds of the sale after deducting the costs and expenses of the judgment and execution against F. L. Tyson.

4. Before the seizure and sale of said mules the said defendant was told by the plaintiff or her husband, F. L. Tyson, that the two pairs of black mules and one single mule were the property of the plaintiff, Ida L. Tyson, and that they were not the property of the said F. L. Tyson, &c.

5. The defendant is the brother of the husband of the plaintiff.

Although the above facts were practically admitted by the pleadings, the plaintiff called witnesses to establish them at the trial. The main contest at the trial was the endeavor of the plaintiff to establish independent ownership of the property in question by evidence in detail as to how she acquired each animal in question to convince the jury of her claim.

The evidence for the defense did not directly contradict any of the material evidence adduced for the plaintiff but its trend was to establish the theory that the mules had been acquired and paid for out of the joint accumulation of the husband and his wife, while they were living together on farms rented by the husband and that consequently the property so accumulated was in the law the property of the husband. The evidence was all left for the consideration of the jury and both parties signified their agreement with the Court's expressed views by declining to except to any part of the charge. The jury returned a verdict for the plaintiff. As will be seen by reference to the stenographer's transcript of the trial, the verdict was for the sum for which the mules were sold by the constable, with interest from the day of the sale, and fifty dollars damage.

The plaintiff's statement demanded punitive damages, and some of the evidence, if believed, indicated wantonness on the part of the defendant; both counsel for defendant and counsel for plaintiff discussed the question of such damages in their arguments to the jury, so that it was incumbent on the Court to instruct the jury on the disputed question of punitive damages which was done in the following language: "In cases of this kind, sometimes the law will permit a jury to impose punitive damages where they find for the plaintiff. Now, punitive

damages means damages as punishment. Sometimes it is called exemplary damages, which means damages for example, to set an example for other persons. Only in cases where there is wanton carelessness, where there is vindictiveness, or spite, or where the defendant acts through malicious impulse, and thus injured or attempted to injure the plaintiff, is it usual to impose such damages. There is hardly any measure for me to present to you by which you could calculate that kind of damages. If the plaintiff was humiliated by the defendant's actions, or if the defendant acted in such a malicious manner that in your verdict you should say to defendant, you must pay so much as punishment, or we will set the example to others who are liable to do the same thing upon impulse, you can calculate what such punitive damages should be, if you render a verdict for the plaintiff." All the points submitted and not withdrawn were affirmed by the trial judge and no request was made for any additional instructions.

Now the defendant asks for a new trial, because, he alleges through his counsel, that

"1. There was no evidence to support the verdict for punitive damages.

"2. The Court erred in admitting in evidence plaintiff's exhibit 'No. 2, G.M.D.,' being note of Ida M. Tyson and Henry Tyson to Levi Kaltreider, for four hundred and fifty-two dollars ($452.00) dated March 22nd, 1911, under objections of defendant."

"3. The Court erred in admitting in evidence receipt, being plaintiff's exhibit 'No. 3, G.M.D.,' under objections of defendant."

"4. The Court erred in admitting as evidence plaintiff's exhibit 'No. 4, G.M.D.,' being receipt."

"5. The Court erred in admitting in evidence plaintiff's exhibit 'No. 5, G.M.D.,' being receipt from D. F. Frey."

"6. The Court erred in admitting in evidence plaintiff's exhibit 'Nos. 7 and 8 G.M.D."

"7. The Court erred in admitting in evidence note, under plaintiff's exhibit 'No. 9, G.M.D."

"8. The Court erred in not sustaining defendant's objection to testimony of J. B. Heilman on page 24."

"9. The Court erred in not striking out the testimony of O. R. Arnold on page 33, as requested by defendant."

"10. The Court erred in not striking out the cross-examination of W. E. Craley, by plaintiff, as requested by defendant on page 41."

"11. The Court erred in not sustaining defendant's objection to the offers of the plaintiff on papers marked exhibit 20, 21, 22, 23, 23½, and 24. The said papers being offered by the plaintiff for the purpose of corroborating the witness (Mrs. Tyson) in her answers to the questions propounded on cross examination by counsel for the defendant."

The uncontradicted evidence was that the defendant was not only told before the levy and sale by the plaintiff and her husband that the property which was sold by the constable by the persistent requirement of the defendant, belonged to the plaintiff, but the constable informed him of such a claim by the plaintiff, which was given in writing before the sale under execution. The evidence to that effect produced by the plaintiff was such as the jury evidently believed, and was such that the facts could easily have been ascertained by the defendant, if he would have been inclined to have made proper inquiry before he ordered the levy and sale of the property. It was for the jury to say from the evidence if the defendant acted with such undue wantonness or maliciousness as to warrant the punishment which it inflicted upon him by the verdict. The defendant's evidence divulges no act of care for the rights of the plaintiff and no excuse for levying and selling her property for the debt of another, than his own general statement that he asked the boys of F. L. Tyson, who are the step-sons of the plaintiff, and they said the mules belonged to their father. The jury evidently did not think that he was warranted in so recklessly and negligently inflicting the humiliation and trouble of a constables' sale upon the plaintiff after she had informed him of her exclusive ownership of the property which he persistently caused to be sold. (See Whelan v. Miller, 49 Pa. Super. Ct. 99).

In our opinion, the evidence justified the verdict. The first reason for new trial is, therefore, dismissed.

The 2nd, 3rd, 4th, 5th, 6th, and 7th reasons assigned as errors and for which defendant asks for a new trial, are all admissions of collateral evidence by the Court: they were not offered as complete or conclusive evidence but only as incidental and tending to corroborate the plaintiff's direct testimony on the same subject. They were offered in connection with the prior testi-

mony of the witness. They were private writings and their execution was proven by competent witnesses.

"When a private writing is not directly in issue, but comes incidentally in question, its execution may be proved by any competent testimony"; Kitchen et al. v. Smith, 101 Pa. 452, 35 L. R. A. 350 (note XIV) which cites Pennsylvania cases.

The 8th, 9th, and 10th reasons are alleged errors of the Court in not striking out certain testimony.

The 8th was an exception to certain testimony of J. B. Heilman, who, the plaintiff's evidence tended to show, sold certain of the mules which had been levied upon and sold by the constable as the property of F. L. Tyson, after, (as the trend of the evidence was) plaintiff had notified the defendant, that said mules belonged to her. The burden of proof was upon the plaintiff to prove property, and the evidence complained of, was, of course, not conclusive, but taken with all the proceeding evidence on record was *res gestae*, and tends to establish with the other evidence the theory upon which the plaintiff was trying to prove her case. It was not, (as defendant's counsel objected) a self-serving declaration, because it was made not by any party in this suit, but by another person, to an entire stranger whose ostensible object was to make a sale to a responsible person; it pertains directly to the very claim of exclusive property in the plaintiff which she was endeavoring to establish. As was said by Lowrie, J., in Hollinshead v. Allen, 17 Pa. 275. "It is a principle of law, of logic, of philosophy and of common sense, that in order to decide with accuracy upon the character of any phenomenon or transaction we must know all the facts of which it consists, and all the circumstances that are truly connnected with, and influence it." This is also true when we view, with the whole testimony, the evidence of O. R. Arnold and W. E Craley, complained of by defendant in his 9th and 10th reasons for a new trial. (See Rees v. Livingston, 41 Pa. 113).

The 10th reason given for a new trial, is viewed by the Court as being without merit, the exhibits complained of as being admitted were, as the evidence tended to show, notes upon which the plaintiff had raised the money and credit by which she obtained the alleged ownership of the mules which were the essential subject of the suit, and having been paid by her and produced by her, were pertinent illustrations of the truth of her testimony and of the testimony of other of her witessess.

The reasons advanced do not convince the Court that a new trial should be granted in this case.

And now, April 8th, 1918: The rule granted is discharged and a new trial is refused with an exception to defendant.

C. P. of Lancaster Co.

Minnich v. Hagen.

Assignment—Right to Collect Balance After Receiving Dividend—Deceit or Fraud.

Where a defendant when he gave judgment for a pre-existing debt, falsely stated to the plaintiff that he had given no prior judgments, this does not constitute such fraud or deceit in contemplation of Section 33 of the Act of June 4, 1901, P. L. 404, as will permit the plaintiff to issue execution on his judgment after having received and duly released for, a dividend from the assigned estate of the defendant who was a farmer.

As to farmers the Insolvency Act of June 4, 1901, is not suspended by the Federal Bankrupt Act of July 1, 1898, but is in force.

A falsehood or deceit can only be taken cognizance of by the courts where it has induced some one to do some act to his own injury.

Rule to open judgment and let defendant into a defense.

H. Edgar Sherts for rule.

Chas. E. Workman and *Coyle & Keller*, contra.

March 23rd, 1918. LANDIS, P. J.—By the Insolvent Act of June 4, 1901, P. L. 404, Section 23, it is provided that "no claim against the insolvent's estate shall be allowed unless the claimant, or some one for him if he cannot do so, shall furnish to the assignee or receiver a statement of his claim, together with a copy of any book entries appertaining thereto, or any note or other writing evidencing the same, verified by an affidavit," and, "if such claim and affidavit be in proper form, and the balance claimed agrees with the amount stated by the insolvent, or upon consultation between the creditor and the insolvent the amount is agreed upon, the claim shall be allowed if presented before the filing or audit of the account, unless objected to in the manner hereinafter set forth." Section 26 provides that, "if, at the time of filing the account and list of proved claims, there are claims which remain unadjusted, or if objections be filed, the court shall hear and decide the disputed

matters, or, in its discretion, may appoint an auditor for that purpose." Section 30 declares that, "at the time of receiving his dividend in case of a voluntary assignment, each creditor shall sign triplicate releases," and that "one of said releases shall be filed in court, one shall be retained by the assignee, and one shall be delivered to the insolvent." Section 33 declares that "nothing in this Act shall be taken or understood as discharging an insolvent from liability to such of his creditors as do not choose to exhibit their claims, or who, before the schedule of distribution is made or filed, withdraw their claims; but, with respect to creditors who exhibit their claims before a voluntary assignee, or an auditor appointed in such case, and do not withdraw them as aforesaid, they shall be wholly debarred from maintaining afterwards, by suit, action, execution or otherwise, any claim existing at the time of the assignment, whether due or not, unless he shall aver and prove: (1) That said action is founded on the actual force, fraud, malice, or deceit of the insolvent," &c.

The admitted facts of this case are these; On October 10, 1911, a judgment was confessed by the defendant to the plaintiff for the sum of $303.00, and it was entered in this Court to the above term and number. On March 22, 1912, a writ of *fi. fa.* was issued upon it, to April Term, 1912, No. 41, Execution Docket. On March 22, 1912, the defendant made a deed of voluntary assignment for the benefit of creditors, under the Act of 1901, to John G. Homsher, Esq., and his property was taken possession of by the assignee. The assignee disposed of it, duly filed an account of his trust, and the balance for distribution remaining in his hands was regularly audited and distributed among the creditors who had conformed to the above Act. In these proceedings, the plaintiff presented and proved his claim on the judgment, and was awarded a dividend of $70.45, which was paid to him on October 21, 1913, and he thereupon, in accordance with section 30, executed a release in the form set forth in the Act of Assembly.

On February 26, 1918, the plaintiff issued an *alias fi. fa.* upon this same judgment, and, under it, the personal property of the defendant was levied upon by the Sheriff. On March 2, 1918, the defendant presented his petition, in which he set forth the assignment, the distribution and the release. As an answer to this, the plaintiff asserts that the case is within the exception to the Act, as being founded on the fraud or deceit of the defendant.

The facts concerning the origin of the indebtedness are not in dispute. The plaintiff was a dealer in cattle, and the defendant, from time to time, had made purchases from him. On October 10, 1911, the defendant was indebted to the plaintiff in the sum of $303.00. Thereupon, the latter and his counsel had a meeting with Hagen, at the Leopard Hotel in the City of Lancaster, and, under a threat that, unless he paid the indebtedness or signed the judgment note, suit would be brought, they induced him to put his signature to the judgment note. The plaintiff now alleges that, at that time, the defendant stated to him that he had not signed any other notes; and, as a matter of fact, this was not true, as he had, about a year before, confessed a judgment to Frank K. Lefever, for moneys due by him to Lefever. This is the fraud or deceit upon which he seeks to avoid the effect of his release in the assignment proceedings. It is not claimed that any money or valuable thing was obtained by Hagen from Minnich at the time the judgment note was executed. It was given solely to secure the prior indebtedness, and Minnich parted with no property at that time on the faith of it. The question, therefore, arises whether or not, under such a state of facts, he has a right to proceed upon his judgment.

We are of the opinion that he has no such right. In Citizens' National Bank v. Gass, 29 Sup. 125, it was decided that "wage earners and persons engaged chiefly in farming or the tillage of the soil cannot be subjected to the provisions of the Federal Bankrupt Act of July 1, 1898, without their consent," and that, as to such persons, the State Insolvency Act of 1901 is in force. Again, in Miller v. Jackson, 34 Sup. 31, it was held that the above Act is not suspended by the Federal Act as to farmers.

In this case, the defendant was a farmer. The Act of 1901, therefore, applied to him, and it applied in all its parts. As the plaintiff elected to participate in the distribution and presented his judgment bond for a dividend, he was bound by all the provisions of that Act.

Fraud is a civil wrong or tort, known as deceit, and gives the person injured a right of action for damages. The action will lie against any one who makes a false representation of fact, with knowledge of its

falsity, and with intent that it shall be acted upon, when the person to whom it is made acts upon it, and by so doing suffers injury. To entitle a person to relief or redress because of false representation, it is well settled that it is not enough to show merely that it was material, but that it was known to be false, and that it was made with intent to deceive; and it must be shown that it actually did mislead and deceive, and loss was occasioned thereby. It has been said that falsehood and deceit are always subject to moral condemnation, but that it is not appointed to human tribunals to sit in judgment upon mere moral delinquencies affecting only the conscience: that such tribunals take cognizance only when another has been induced to do some act to his own injury.

While in this case it is denied by the defendant that, when he signed the note, he stated he had signed no other notes of similar character, yet conceding that the plaintiff in this respect is correct, what harm did he suffer thereby? If, as is admitted, he incurred no new obligation and then parted with none of his property, how can he sustain the position that his obligation was founded in fraud or deceit? Such a situation does not show, in our judgment, that defendant was guilty of the fraud or deceit contemplated by the Act of 1901. It follows that the release barred plaintiff's execution.

For these reasons, the rule to show cause why the judgment should not be opened and the defendant let into a defense is made absolute.

Rule made absolute.

C. P. of Montgomery Co.

Wilson v. Philadelphia Rapid Transit Co.

Automobile—Street car—Right of Way.

Plaintiff backed his automobile out of the driveway across defendant's tracks to run northward on the east side of the street. A trolley car moving in the same direction collided with plaintiff's automobile.

At the trial the motorman's and conductor's statements which were made at the time of the accident were admitted. The admission of these statements are the only grounds upon which judgment for defendant *non obstante veredicto* is asked. HELD, that since these statements were made immediately after the occurence of the accident, they are properly admissible, and therefore, the defendant's motion for judgment *non obstante veredicto* must be overruled.

Evans, High, Dettra & Swartz for plaintiff.

Larzelere, Wright & Larzelere for defendant.

October 22, 1917. SWARTZ, P. J.—The plaintiff's car was standing in the driveway leading into Wenner's Coal Yard from Cresmont Avenue. He was accompanied by Mr. Romig, his father-in-law. Cresmont Avenue is forty-four feet wide from curb to curb line, and two tracks of the defendant trolley company are located along the middle of this highway. The part of the road occupied by the trolley tracks is paved with brick. The Avenue runs north and south. The roadways, on the east and west sides of the street, are not in condition for travel with vehicles. Automobiles and carriages necessarily use the paved part of the highway occupied by the trolley tracks, or at least a part thereof. The cars run north on the east track and south on the west track. Wenner's Coal Yard is on the west side of Cresmont Avenue.

The plaintiff backed his auto out of the driveway. He intended to run northward on the east side of the street. A trolley car of the defendant company was moving on the east track and was, therefore, going in the same northward direction. When the plaintiff backed his car he says he curved toward the south, so as to bring his car on the east side of the Avenue facing it northward,—the direction in which he intended to drive.

There was a collision between the automobile and this trolley car that was moving northward.

The witnesses differ seriously, as to the point in the street where the accident happened and how it was brought about.

There was a slight snow on the ground, at the time.

The plaintiff testified, that he backed his auto out of the driveway, in a southerly direction, and crossed over the Avenue in a diagonal course till his car stood in the middle of the east trolley track. He declared that when his car stopped he was ten or fifteen yards south of the Wenner driveway or lane, that he then reversed the motion of his car, started forward on low gear, at three miles an hour, that he had

trouble in starting because his wheels slipped on the snow, that he went forward fifteen or twenty yards partly on the east trolley track and was then struck in the rear by the trolley car. His auto was pushed to the west side of the Avenue, a little to the north of the Wenner driveway entrance. He was thrown from his auto and landed on the west side of the highway. He alleges that the bones of his wrist were displaced, that his ankle was hurt, and that his abdomen was injured by the fall on the roadway. The top of his car was wrecked and the car itself was damaged.

His car when struck was driven to the west side of the Avenue and stood at a right angle with the street and trolley tracks. The front of the car faced the west bank of the highway. This point was ten feet north of the driveway.

The plaintiff declares, that he looked up and down before he entered his car and that he continued to look through the rear glass of his machine and could see as far south as Hamilton Street, as he backed upon the east or north bound track. Hamilton Avenue is over six hundred feet south of the Wenner driveway. There is a down grade on Cresmont Avenue looking southward from the Wenner Coal Yard. This down grade ends in a hollow a little south of Decatur Avenue. The distance from the Wenner driveway to this hollow is about four hundred feet. From the point of this hollow there is a steep up grade to the south for a distance of more than fifteen hundred feet. The down grade south from the Wenner Coal Yard is a moderate grade, but increases as you travel northward from the Coal Yard. Cresmont Avenue is straight for nearly one mile, and standing on or along the highway, at the Coal Yard, there is an unobstructed view, to the south, for about one-half a mile.

The movements of the plaintiff's automobile, immediatdly before and after the collision, as described by him, were confirmed by other witnesses. Mr. Wenner traced the course of the auto in the snow. He says that there were no other tracks at the time to interfere with his observations. He testified that the auto backed southward on Cresmont Avenue, about three car lengths, then started forward with some difficulty because the snow indicated the slipping of the wheels, that it moved forward to the Wenner driveway and landed on the west side of the highway, as already described.

Mr. Eason describes the accident, in accord with the plaintiff's account, but he adds, that when the automobile stopped backing it was on the north bound track and that the trolley car, was at Hamilton Avenue—that is more than six hundred feet distant from the automobile. He turned around and in two seconds he heard the crash. The automobile, he says, had moved forward twenty-five feet, was running parallel with the highway, and was struck in the rear.

The motorman and conductor testified to a different state of affairs. According to their account the plaintiff backed into, or right in front of the moving trolley car. Their evidence is corroborated by witnesses who were passengers in the trolley car and by others. They also declared, that the speed was moderate and that the motorman had his car under control.

We instructed the jury, that if the accident happened as described by the defendant's witnesses the plaintiff could not recover. We went a step farther and declared, that unless the jury found that he had backed his car on the tracks, had then gone northward some distance, and was then struck by the trolley car, there could be no recovery.

We think it is self evident that if the automobile had passed out of the driveway, backed southward upon the north bound track, and was at that point when the trolley car was more than six hundred feet away, that it must then follow that the motorman did not have his car under the control that the conditions before his eyes demanded.

It required some time for the plaintiff to cross the highway. It required time to reverse his engine and to start his car forward in the slipping snow. It required additional time to go forward the distance of "fifteen or twenty yards." Especially so if the plaintiff was running but "three miles" an hour. If the trolley car traversed the six hundred feet in two seconds, or while the witness Eason turned around, it indicates reckless speed under the circumstances. Of course these expressions of the witness are extravagant, but they indicate that to his mind the plaintiff had no opportunity to make room for the on-coming trolley car. The motorman was in duty bound to give the plaintiff sufficient time to move from the trolley tracks. The employees of a street railway company are bound to keep their cars under control and have no right

to run down the driver of a vehicle when on their tracks or when in the act of leaving the tracks. They are bound to use every reasonable effort to avoid a collision. The driver of a vehicle is entitled to a reasonable time to get out of the way; Woelfel v. Railway Co., 183 Pa. 213; Holt v. Penna. R. R. Co., 206 Pa. 356; Davis v. Electric Railway Co., 25 Pa. Superior Ct. 444.

Special precautions were required by the motorman in this case because he must have known that to get out of the way meant to leave one trolley track and enter upon the other. We took a careful view of the grounds and we fail to see how a fast railway line can with safety make a common use of this highway with carriages and automobiles. The plaintiff did not make use of Cresmont Avenue from choice, but he was called to the Wenner Coal Yard in pursuit of his professional business.

It is argued that the trolley car was coming up a grade for some distance, just before the collision, and that this fact gave the motorman control over his car. This would necessarily depend upon the speed and momentum of the car as it reached the foot of the long and steep hill.

The distance to the point of the collision from the bottom of the down grade and the moderate up-grade would not quickly check a car beyond control at the foot of the hill.

The declarations of the employees, in charge of the trolley car, and made immediately after the accident, would justify the jury in reaching this conclusion. Mr. Wenner says, that the conductor, as he stepped off the back end of his car to the ground, declared,—"I knew damn well we were going to hit that car when we were at the foot of the hill." This statement was made right after the accident.

The plaintiff testified that he had a conversation with the motorman and conductor, immediately after the accident. Counsel for plaintiff then put the question,—"What, if anything, did they say with reference to the operation of the car?" Counsel for defendant objected. The court then ruled "You will have to show how long or how soon after the accident it was."

Counsel for plaintiff,—"I said immediately after the accident." By the Court,—"Then it is competent." Counsel for defendant,—"If it was immediately, then it was right during the accident before they moved away, or conditions had changed or anything of that sort." By the witness,—"That is right."

The plaintiff testified that the motorman stated, "He was going down the hill so fast, he could not control the car." "I put on my brakes and took them off again, and put them on again and off again, and then I made up my mind I was going to kill somebody." There was some further cross-examination, as to the occurrences immediately after the accident, but these declarations by the conductor and motorman, according to the evidence, were voluntary statements, made immediately after the accident. This is certainly true as to the conductor who uttered his words as he stepped from his car to the ground. The plaintiff was asked whether the declarations of the employees were made after the conductor entered the office and telephoned. The answer was,—"No, it was immediately after the accident." Mr. Wenner also says the conductor asked for a telephone station, but asserts that the above statement was made just as the conductor stepped from his car to the ground.

The words used in Hanover Railroad Co. v. Coyle, 55 Pa. 402, fit our case,—"The negligence complained of being that of the engineer himself, we can not say that his declarations, made upon the spot, at the time, and in view of the effects of his conduct, are not evidence against the company, as a part of the very transaction itself."

To the same effect is the ruling in Conlon v. Pittsburg Railway Co., 223 Pa. 101. The declarations of the employees in charge of the operations of the trolley car were admissible because they fully meet the tests laid down by the law for their admission,—"They must be made under such circumstances as will raise the reasonable presumption that they are the spontaneous utterances of thought created by or springing out of the transaction itself and so soon thereafter as to exclude the presumption that they are the result of premeditation or design." The motorman and conductor were operating the colliding car; they stepped from it; saw the effect of the collision and at once made the declarations without any inquiry addressed to them intimating negligence on their part.

These conditions are entirely at variance with the facts found in the case of McCullough v. Phila. Rapid Transit Co., 16 Dist. Rep. 513, cited by counsel for the defendant, where the injured party asked the motorman for his explanation of the accident. In

Coll v. Easton Transit Co., 180 Pa. 618, the motorman assisted in carrying the injured person to a railroad station one and one-half blocks from the place of the accident. He then explained how he came to run over the body of the deceased. This was two minutes after the occurrence and not at the point where the injury was inflicted. The Court held that the declarations were admissible.

The only specific reason for a new trial relates to the admission of the declarations of the motorman and the conductor. The application for a new trial is refused.

From what we have said in relating the occurrences as given by the plaintiff's witnesses and the circumstances surrounding the accident, we are convinced, that the case was for the jury to determine whether the defendant's car caused the accident through negligence because those in charge of the car did not operate the same with reasonable care under the circumstances and did not have the car under proper control. Whether the plaintiff was guilty of contributory negligence was also for the jury.

The motion for judgment in favor of the defendant, *non obstante veredicto*, is overruled.

QUARTER SESSIONS

Road in Carroll Township.

Road—Vacation—Report of Viewers.

On petition viewers were appointed to vacate a public road, and reported that "the part of the road proposed to be vacated has become useless, inconvenient and burdensome," and "there is no occasion for a public road beeween the termini set forth in the petition and order of court." Exceptions were filed to the report on the ground of the indefiniteness and insufficiency of the petition and report. HELD, that the exceptions must be dismissed.

As the report set forth the holding of a public meeting at which all parties, with their counsel, were present, and was accompanied by the testimony of witnesses under oath, the report, as a whole, was clear and intelligent enough to withstand the exceptions filed thereto.

The petition having set forth that the road is a public road, it is no ground for an exception in that it is not stated how it became such.

The sworn facts in the viewers' report, without legal refutation, must be assumed to be true.

If it is not such a road as is properly within the jurisdiction of this court, it is incumbent on the objector to show that fact.

No. 6, April Sessions, 1917.

In re Exceptions to Report of Viewers.

S. B. Meisenhelder, for exceptions.

Logan & Logan for report.

March 18th, 1918. ROSS, J.—In deciding this case, we have nothing to base our decision upon but the petition for the appointment of viewers, the report of the viewers, and the exceptions filed thereto.

The petition for the appointment of viewers was presented and filed and viewers were appointed June 11th, 1917. The report of viewers was filed in open court, August 27th, 1917.

The following exceptions were duly filed thereto:

"1. The petition for the appointment of viewers to vacate, is indefinite and insufficient in that it does not set forth in a clear and distinct manner the situation and other circumstances of such road or highway which is proposed to be vacated, sufficient to inform the Court of the circumstances which render the road unnecessary, as provided by the Act of June 13th, 1836, P. L. 558, Section 18, or by the Act of 1860, commonly known as the York County Road Law.

"2. The report of the viewers does not sufficiently set forth the facts and circumstances surrounding the said vacating or the situation and other circumstances of the said road or highway vacated, as required by the Act of Assembly, to enable the Court to intelligently pass upon the necessity for the vacation.

"3. The road vacated had not become useless, unnecessary and burdensome. The testimony before the viewers of one of the supervisors was to the effect that in eight years he had not spent more than twenty dollars on the road.

"4. The vacation of this road deprives adjoining property owners of a near access to public schools and other public roads.

"5. The petition does not set forth how said road became a public road.

"6. The proceedings do not set forth that the meeting of the viewers was advertised according to law.

7. The advertisements of the time and place of notice were not given in the manner prescribed by the Act of Assembly.

"8. There is no proper legal notice given of the time and place of the meeting of the viewers."

Although the 1st, 2nd, and 3rd exceptions are not explicit, from the exceptant's brief, and argument at the hearing of exceptant's

counsel, we presume they relate to the alleged inadequacy of the report, in specifying particularly the reasons upon which the viewers based the conclusion or matters of fact which they reported, to wit: "1. The part of the road proposed to be vacated has become useless, inconvenient and burdensome."

"2. There is no occasion for a public road between the termini set forth in the petition and order of court."

If those conclusions were all of the report, it might be deemed proper to recommit the report for further explanation; but the viewers also describe their meeting, their advertisment, and the several adjournments and a public meeting held in the Court House at York, at which public hearing appeared, among others, "the full board of road supervisors of Carroll Township, * * * * petitioners by their counsel, Logan and Logan, Esqrs., and objectors by S. B. Meisenhelder, Esq., their counsel." Testimony was given by witnesses under oath, and the conclusions are drawn from the personal view of the Board of viewers and their hearing of the testimony. We have none of that testimony before us, but the draft of the portion of the road which was passed upon is annexed to the petition, and shows the surroundings together with the course and distance of another public road which touches the same termini given in the petition.

We think under the decisions, the report and petition, on which the viewers were appointed, are clear and intelligent enough to withstand the 1st, 2nd and 3rd exceptions; West Donegal Township Road, 21 Pa. Super. Ct. 621; Drumore Township Road, 49 Pa. Super. Ct. 493; Bristol Township Road, 49 Pa. Super. Ct. 549.

The 4th exception is refuted by the draft which is attached to the report showing a public school house within close proximity to the premises of Lottie J. Nelson, who is the only exceptant to the report.

The 5th exception is without merit. The petition asking for the appointment of viewers describes the road to be vacated as a "public road," and the presumption is that it was a public road. If it is not such a road as is properly within the jurisdiction of this court, it is incumbent on the objector to show that fact.

The sixth, seventh and eighth exceptions are refuted by the sworn facts which appear in the viewers' report, which, without legal refutation, must be assumed by this court, as true; In re Road in Strasburg Township, 15 D. R. 666.

Exceptions are dismissed and the report of the viewers is hereby confirmed.

Q. S. of Lancaster Co.

Com. v. KoEune.

Criminal Law—False Pretense—Signature to Written Instrument—New Trial—Question for Jury.

Where on the trial of a defendant charged with false pretense it is shown that the defendant falsely represented himself as the insurance adjuster for the company in which the prosecutor, who had sustained a fire loss, was insured, and thereupon the defendant obtained the signature of the prosecutor to a contract employing the defendant to advise and assist in the insurance claim at a fee of ten per cent. of the amount of the adjustment, the case is for the jury, notwithstanding that the defendant proposed to render service for his compensation.

It was a question for the jury whether the false pretense in obtaining the signature was sufficient to deceive an ordinarily prudent man though the prosecutor signed without reading the instrument, which would have shown the falsity of the defendant's representations.

Rule for new trial.

John A. Nauman and *S. R. Zimmerman* for rule.

John E. Malone and *S. V. Hosterman*, Assistant District Attorney, contra.

July 7th, 1917. HASSLER, J.—The defendant was convicted on an indictment which charged that he did "unlawfully and knowingly and designedly falsely pretend to the said E. W. Brown, whose personal property, located in the Imperial Hotel, Lancaster, Pennsylvania, had been destroyed by fire and was insured by various insurance companies, that he, the said P. Curtis KoEune, was the insurance adjuster sent up to adjust the said E. W. Brown's fire loss, by color and means of which said false pretense and pretenses, he, the said P. Curtis KoEune, did then and there unlawfully, knowingly and designedly obtain from the said E. W.

Brown his signature to the attached contract, with intent to cheat and defraud, &c." The contract to which the signature of the said E. W. Brown was obtained, a copy of which is attached to the indictment, is as follows:

"To the Insurance Companies interested:

"This is to certify that P. Curtis KoEune Co., Inc,, or its representative, is hereby retained to advise and assist in the adjustment of the Insurance Claim arising in consequence of Fire, Smoke and Water which occurred at 33–35 W. King Street, Lancaster, Pa., on 31st day of March, 1916, to Stock-Fixtures-Building-Plant-Household Furniture, and it is agreed to pay the said P. Curtis KoEune Co., Inc., for such services, fee of ten per cent. (10%) of the amount of adjustment and expenses, hereby assigning to the P. Curtis KoEune Co., Inc., all moneys due or to become due from the Insurance Companies interested to the extent of said fee and advances. The fee of P. Curtis KoEune Co., Inc., shall be due after proofs of loss are sworn to and no fee to be less than twenty-five dollars.

"E. W. Brown (Seal)."

Witness: P. C. KoEune.

At the trial E. W. Brown, the prosecutor, testified that a fire injured some of his property, consisting of furniture, &c., located in the Imperial Hotel in this City, and that he was insured against any loss to it by fire, in two policies of insurance issued by the Glens Falls Fire Insurance Company.

The fire occurred on March 31, 1916, about ten o'clock A. M. The defendant called upon him between two and three o'clock P. M., and again at five o'clock P. M., of the same day. On his first visit he said that "He was the adjuster for the Insurance Company, was sent there to adjust this loss by the insurance company that I had." On his second visit he testifies as follows: "He called to my wife and myself to come over, he wanted to get this thing fixed up, the sooner it was fixed up the sooner it was over. He told us then he was the adjuster for the Insurance Company I was insured in, and he said 'sign your name here, and I will go ahead and adjust this loss.'" It is proven also that the defendant was not an adjuster for the Insurance Company, nor sent by it to adjust the loss.

The next morning, April 1, 1916, the defendant again called upon the prosecutor. The local agent of the Insurance Company was present at that time. He told the prosecutor, not in the hearing of the defendant, that the defendant was not the Insurance Company's adjuster, and the prosecutor thereupon refused to allow him to do anything further. The defendant then said, "I have got your signature and you have to pay me anyhow." On the same day S. R. Zimmerman, Esq., acting as attorney for the defendant, sent notices to the Insurance Company of the assignment, and also gave it a copy of the same. Most of this testimony is corroborated by several witnesses.

The defendant denied this testimony as to how he obtained the signature of the prosecutor to the contract, but as the jury evidently believed the Commonwealth's testimony, it only remains for us, in disposing of this rule for a new trial, to ascertain whether it is sufficient to sustain a conviction.

Four reasons for a new trial have been filed. They raise but two questions, the first one of which is that there should have been no conviction because there is no evidence of any intention on the part of the defendant to defraud the prosecutor, as he proposed to give service for the amount which he was to obtain from the prosecutor by reason of the contract.

The intent to cheat and defraud is to be inferred from the circumstances of each case; 2 Wharton on Criminal Law, Sec. 1448. The acts of the prisoner after, as well as before obtaining the goods are evidence of his intention to cheat and defraud; Com. v. McCrossin, 2 Clark 6. The circumstances here are that the prosecutor sustained loss by fire, and had a claim for such loss againt an insurance company. He does not appear to have wanted nor needed the service of any one to adjust his loss. The defendant appears to have been of this opinion, else he would have offered his services and bargained for their payment without pretending to be what he was not. He evidently believed that he could not obtain the employment and thus be benefited by the compensation he would receive if he told the prosecutor what his business was, so he falsely represented that he was the representative of the insurance company, thus obtaining the prosecutor's signature to a contract for the payment of his services. It was certainly the intention of the defendant by his false representation to deceive the prosecutor into obligating himself to pay for

services that he did not want or need. He would, therefore, be cheating and defrauding the prosecutor of whatever amount was necessary to pay for such services. It was clearly the intention of the defendant that the prosecutor should do this or he would not have tied up the amount due to the prosecutor from the insurance companies by giving notice of and a copy of the assignment to it. We are of the opinion from the circumstances that the defendant intended to cheat and defraud the prosecutor, and that the jury were fully justified in finding by their verdict that such was the fact.

The second reason urged why a new trial should be granted is that the false representations were not such as would deceive an ordinarily prudent man, and that therefore there should have been no conviction. Sec. 111 of the Act of 31 March, 1860, P. L. 410, provides that "If any person shall by any pretense obtain the signature of any person to any written instrument with intent to cheat and defraud any person of the same, every such offender shall be guilty of a misdemeanor, &c." It will be observed that the act of assembly does not state that the pretense must be such as would deceive an ordinarily prudent man. It is sufficient if a person by a false pretense does obtain the signature with the intention to cheat and defraud. In Com. v. Burdick, 2 Pa. 164, Chief Justice Gibson takes this view of the Act of 1842 which is practically the same in this particular as the Act under which this indictment is drawn. He says, "But I think it, at least, doubtful whether a naked lie, by which credit has been gained, would not, in every case, be deemed within our statute, which declares it a cheat to obtain money or goods 'by any false pretense whatsoever.'" This case is followed by the Supreme Court in Com. v. Henry, 22 Pa. 253, where the false pretense was that the defendant had a warrant for the arrest of the prosecutor's daughter. It was decided that this was a sufficient pretense under the Act, even though the prosecutor might have asked to see the warrant and thus have discovered that there was none. In Com. v. Moore, 99 Pa. 570, it is decided that the rule as laid down by Justice Gibson is too broad in that it could cover a false statement of something that was to be performed in the future. False pretense must be of an existing fact. This is the only modification, by an Appellate Court, of the rule as stated by Justice Gibson, that we have been able to find.

It is true in this case that the prosecutor might have discovered that the representations made by the defendant were false if he had read the paper which he signed, as that showed that he was not acting as representative of the Insurance Company but as a representative of another company who made it a business of adjusting fire losses. We do not think it was necessary for him to have read the paper which he signed. The excitement in the place where the fire had been was such, and the understanding of the average person as to matters relating to fire insurance is such, that when a man represented himself to be the representative of the company, a prudent man would have accepted that and acted just as the prosecutor acted in this case, viz: signed the paper he was told to sign to enable the defendant to proceed with his work of adjusting the loss. Under the circumstances in this case it was, in our opinion, a question for the jury whether the false pretenses were sufficient to deceive even an ordinarily prudent man; 2 Wharton on Crim. Law, Sec. 1455, page 1654, and we submitted it to them. We think the jury were justified in finding a verdict of guilty by the law and the testimony.

We have read the case of Com. v. Getler, 19 C. C. 248, cited by the defendant, and while it does not agree with our conclusions we are not convinced that they are erroneous. We, therefore, discharge the rule for a new trial.

Haas' Case.

Sheriff—Fees and Emoluments—Victualling Prisoners—Petitions.

Duplicates of a petition, which had been separately circulated to secure signatures, were attached to and filed with the original. Only one of these, having seven signatures thereto, was sworn to On a motion to dismiss the petition because it was not sworn to, HELD, that the motion must be dismissed.

Whether all the papers are treated as one petition, or regarded separately, is entirely immaterial, because any one of them duly sworn to, would be sufficient to sustain this proceeding, so far as the provisions of the Act of August 9, 1915, P. L. 72, are concerned.

Allegations in the petition of ill treatment of certain prisoners, without giving names of parties or nature of injuries, and not signed or sworn to

by any of the sufferers, are not sufficient grounds upon which to base an unusual proceeding.

The court has no jurisdiction to inquire into or change the fees or emoluments of the sheriff fixed by Act of Assembly.

But the charges made against the sheriff in connection with victualling the prisoners are such as can be heard and determined by no one else except the court, because the amount of the sheriff's allowance is fixed by the court itself.

Petition of taxpayers and citizens for an inquiry into fees and emoluments of the sheriff's office.

Motion to dismiss the petition.

Geo. S. Love for motion.

A. C. Wiest, contra.

April 18th, 1918. WANNER and ROSS, JJ.—The petition filed in this case charges the Sheriff of York County with ill treatment of prisoners in the county jail, with furnishing them unfit and insufficient food, and with procuring an excessive allowance in payment of the same, through fraud and misrepresentation.

The respondent denies said charges, and moves the Court to dismiss the proceedings because the petition is not sworn to as required by the Act of August 9th, 1915, P. L. 72, which provides: "That a judge of any court of record shall not, in any matter, case, hearing, or proceeding before him, receive or consider any petition, or paper in the nature of a petition, alleging any matter of fact, unless the petition or paper is duly verified as to such allegations."

It appears that the duplicates of the original petition containing precisely the same contents, which had been separately circulated for signatures, were all attached to and filed with the original in court. One of these having seven signatures thereto, was duly sworn to before an alderman. Whether we treat all of them as one petition, therefore, or regard them as separate petitions, is entirely immaterial, because any one of them duly sworn to, would be sufficient to sustain this proceeding, so far as the provisions of the Act of 1915 are concerned.

The complaint of violence and ill treatment of certain prisoners is not signed or sworn to by any one who is alleged to have suffered at the hands of the sheriff, or desires to institute a prosecution on that account. Neither does it give the names of any of the injured parties or the nature or extent of the physical ill treatment suffered by them. The affidavit to the petition is not made by a signer thereof, nor is it averred that the affiant has personal knowledge of the material facts set forth therein. There is no allegation that the injured parties have sought or have been refused redress in the ordinary legal channel. There does not, therefore, seem to be sufficient ground laid in this petition upon which to base an unusual proceeding like this in court.

The District Attorney is the proper officer before whom to lay the facts, when no private prosecutor desires to assume the responsibility of bringing an information. If the facts are sufficient to warrant the prosecution, it will then be ordered and conducted by the District Attorney, officially. There does not, therefore, seem to be any necessity of the court intervening in these cases until ordinary methods of procedure fail.

But the charges made against the sheriff in connection with victualling the prisoners are such as can be heard and determined by no one else except the court, because the amount of the sheriff's allowance is fixed by the court itself.

All the other fees and emoluments of the sheriff's office are fixed by Act of Assembly and the court has no jurisdiction to inquire into or to change them. The allegations of this petition as to the amount of the sheriff's official emoluments, and accumulations of money, and other similar financial matters, outside of the item of victualling the prisoners are, therefore, matters which are not pertinent or material to this inquiry. They should, therefore, be omitted from such testimony as may be hereafter taken in these proceedings.

DECREE.

The respondent's motion to dismiss this petition is refused. The testimony to be taken in this proceeding shall be limited to the petitioner's charges that the food furnished to prisoners by the sheriff has been bad in quality and insufficient in quantity, and that an excessive allowance for the same was procured by him by fraud and false representation. The testimony to be taken in the form of depositions under the rules of this court and submitted to the court at the hearing of the case.

Road in Hellam Township.

Road Law—Notice to Supervisors—Borough Plan.

An exception was filed to the report of road viewers because "The supervisors of the township were not given notice as provided by law." HELD, that the exception is fatal.

A further exception was filed on the ground "that the road was not laid out with reference to the plot of the Borough, or to the general arrangements, convenience or advantage of the Borough." HELD, to be fatal to the preceedings.

No. 2, January Sessions, 1917.

Exceptions to report of Viewers.

Jno. A. Hoober for exceptions.

C. W. A. Rochow, contra.

March 10th, 1918. Ross, J.—Seven exceptions were filed to the report of the viewers. The fifth and sixth exceptions are fatal to the report. They are as follows:

"5. The survivors of the Township were not given notice as provided by law."*

"6 The road was not laid out with reference to the plot of Hallam borough, or to the general arrangements, convenience or advantage of the Borough."

An inspection of the petition for the appointment of viewers shows that it was presented to the Court and viewers were appointed, March 26th, 1917.

The report shows that the viewers met, were sworn and proceeded to the discharge of their duties on the 6th day of April, 1917, at the time and place which had been designated in notices which were served upon the road Supervisors of Hellam Township on the 28th day of March, 1917.

Two of the Supervisors of Hellam Township have joined in the exceptions, and say that no notice was given by the parties who made application to the Court for the appointment of viewers to lay out the new road as is required by the Act of March 29, 1905, P. L. 70, Sec. 1.

The Act referred to requires not only that such a notice must be given, but that a copy of such written notice, properly attested, shall be filed among the records of the Court having cognizance of the matter, "and a failure to comply with the provisions of this Act, as to such notice, shall be sufficient grounds for an application to set aside whatever proceedings may have been taken," &c., &c.

That a failure on the part of the petitioners to comply with the requirement of that act is fatal, has been settled by this Court, in the case of Road in Paradise Township, 19 York Legal Record, 121, and by other courts: See Road in Clarion Borough and Clarion Township, 17 Dist. Rep. 853; Franklin Township Road, 22 Dist. Rep. 431.

In regard to the 6th exception, the Act of May 14th, 1915, entitled "An Act providing a system of government for boroughs, and revising, amending and consolidating the law relating to Boroughs," Chapter VI, Artitle VI, Section 2, P. L. 347, provides, that "Every jury appointed to view, lay out * * * any road, or part of a road in any borough, * * * * * shall have reference to the town plot and to the general arrangement, convenience, and advantage of the borough, and shall set forth the facts fully in their report." This requirement has been totally neglected in the report.

Even the plot or draft attached to the report gives no adequate description of the borough lines.

Those two unexplained and undenied delinquencies in the report and the proceedings of the viewers, render the proceedings so defective that we must sustain the fifth and sixth exceptions filed to the report.

The report and proceedings of the viewers in this case are set aside, at the costs of the petitioners.

Automobiles—Collision at Street Crossing—Right of Way—Negligence.—It has been laid down as a general rule that one reaching the intersection of a street first has the right of way, and in determining whether he can safely cross he need not anticipate a sudden violation of the law of the road by an approaching driver. This is in line with the doctrine repeatedly laid down by the Supreme Court, that a man is not required to guard against the unexpected negligence of another, but is at liberty to presume that the other party will act in conformity with the law and his duty,—especially where that party fails to give any signal capable of being understood as a warning that he intends to arrogate to himself the right of way.—*Morgan v. Duchynski*, (Berks C. P.) 10 Berks County Law Journal 123.

* The exception alleged that the supervisors of the township were not notified of the application for the appointment of viewers.

ORPHANS' COURT

O. C. of Schuylkill Co.

Egan's Estate

Issue devisavit vel non—Question of Fact—Jury Trial.

The legal sufficiency of a writing alleged to be a will constitutes a question of fact which is sufficient to award an issue to be determined by jury.

Petition for Issue.

J. F. Whalen, O. E. Farquhar and *D. J. Ferguson* for Will.

M. M. Burke, contra.

January 21, 1918. WILHELM, P. J.—Mary Egan died on the 29th day of May, 1916. Letters of administration were issued upon the application of Thomas C. Egan, her son, on the 5th day of June, 1916, by the Register of Wills.

On the 14th day of June, 1916, Thomas C. Egan presented to the register a paper purporting to be the last will and testament of Mary Egan, and asked that the letters of administration issued to him be revoked. The letters of administration were revoked, and the alleged will of Mary Egan probated by the register, and letters testamentary issued to Thomas C. Egan.

The witnesses to the will were Kathryn Gallagher and Mary V. Durkin.

Subsequently an appeal was taken from the action of the register in admitting to probate the paper as the last will and testament of Mary Egan. Testimony was taken in support and against the appeal, and it appears that Mary V. Durkin now alleges that her affidavit before the register as to the execution of the will by Mary Egan was untrue. She now asserts that Mary Egan did not execute the will in her presence; that her signature as a witness to the will was written on the paper some days after Mary Egan was buried; and that the first time she saw the paper was the day upon which she attached her signature thereto. She says that she signed the will as a witness at the request of Kathryn Gallagher, the other witness, and that a short time after the will was probated, she had two talks with Kathryn Gallagher in which she expressed her desire to undo the wrong she had committed in signing the paper and in securing the probate.

Kathryn Gallagher testifies that the will was written by her at the request of her mother; the mother dictating the will and the witness writing as the mother dictated, and that the language in the will as set down were the words of her mother as dictated. The will was written between eleven and twelve o'clock on the night of May 20, 1916; that the only persons present were Kathryn Gallagher, Mary V. Durkin and the testatrix, that the mother was suffering from a serious illness, and that the testatrix took the pen in her hand, and unaided made the mark to her will and the will was then and there signed by the witnesses.

Mary Egan was about sixty years of age at the time the will is alleged to have been executed. The day following the execution of the paper she was taken to a hospital and an operation performed upon her, and her death followed in about a week.

The estate of Mary Egan amounts to about nine or ten thousand dollars. Thomas C. Egan is the chief beneficiary in the will, which is as follows:

Shenandoah, May 29, 1916.

MARY EGAN'S LAST WILL

I Mary Egan being of sound mind give devise and bequeath to my son Thomas C. Egan all my stocks, bonds, notes, mortgages and other papers of indebtedness together with my household furniture and my interests in any thing whatever with the understanding that my son Thomas C. Egan will provide a home for my daughter Kathryn Gallagher should she not enter into marriage. Thomas C. Egan my son, will pay to my daughter, Mary V. Durkin, after my decease the sum of Five Hundred Dollars. To my daughter Annie McHale, wife of Richard A. McHale will be given three Hundred Dollars provided in the will of my beloved husband.

her
Mary X Egan
mark

Witnesses:
Kathryn Gallager,
Mary V. Durkin."

On the night of the alleged execution fo the will, Thomas C. Egan, a student at Georgetown College, returned to Shenandoah, and was in the home of Mary Egan, and in bed at the time the will is said to have been executed. Thomas C. Egan, the principal beneficiary, alleges that he did not

know that his mother had executed a will until after he had secured letters of administration upon her estate, and the first knowledge of the will which he had was after his return from Pottsville in the evening of the day letters of administration were issued to him, when he was informed by Kathryn Gallagher that his mother had made a will and was directed to the place containing the will.

If Mary V. Durken was not corroborated in her story, it is possible that it would be the duty of the court to refuse to grant an issue because it might be a dangerous practice to strike down a will when a subscribing witness attempts to nullify it by declaring that her testimony before the register was untrue. But in this case the self-discredited witness is corroborated by the testimony of other witnesses, one of whom, Annie McHale, states that she was in the home and room of her mother at the time that Kathryn Gallagher says the will was dictated, reduced to writing and executed; and who positively states that Mary Egan, her mother, did not make a will during this night.

The testimony of Annie McHale is corroborated by her husband, Richard A. McHale, who says that Annie McHale was at the house of Mary Egan at the time she describes and that he called at the house of Mary Egan at twelve o'clock for the purpose of accompanying his wife to their home.

William J. Durkin, another witness, says he was at the house of Mary Egan on this night, having called there about eleven o'clock, and remained there about fifteen minutes and he saw Annie McHale in the room of Mary Egan during the time of his call.

Mary V. Durkin is further corroborated by the appearance of the will itself. An examination of the paper may well raise a doubt as to whether the name of Mary V. Durkin was appended to the will at the time it was written, because the name of Mary V. Durkin appears to have been written with a different kind of ink from that used in the body of the will, the name of Mary Egan appended thereto, and the name of Kathryn Gallagher, the other witness.

This peculiarity in the will as well as the fact that the existence of the will was not known by Thomas C. Egan for sixteen days after its alleged execution, although he was an inmate of the house of Mary Egan during all of the time between its execution and production of the will, are facts which bear upon the credibility of Kathryn Gallagher, notwithstanding her explanation of this circumstance.

It is unnecessary to discuss all of the testimony, because we think we have pointed out sufficient testimony which justifies us in submitting this case to a jury. And if a jury should find a verdict against the will, the court would not feel constrained, under the testimony, to set aside that verdict.

The contestant's evidence alone seems to make this a case for a jury. The proponent's evidence does not meet, answer and overthrow the contestant's case so as to leave a one-sided issue.

Considering the whole evidence, we cannot say that a jury would not be justified in finding a verdict against the will. There are questions of fact here to be decided, and that is clearly within the province of a jury, therefore, an issue should be awarded.

The legal sufficiency of the writing is in dispute, and the testimony against the execution of the will is sufficient to carry it to the proper tribunal, and the function lies in the hands of a jury.

An issue *devisavit vel non* is granted, and counsel is ordered to prepare a paper in the nature of a precept for an issue to the Court of Common Pleas for trial of the fact whether or not the paper probated as the last will and testament of Mary Egan was executed by the said Mary Egan.

OYER AND TERMINER

O. & T. of Allegheny Co.

Com. v. Ramsey.

Rape—Information—Indictment—Variance as to Crime and Name.

Motions to quash the indictment and in arrest of judgment were refused where it was alleged that the information charged the common law crime of rape, while the indictment founded upon it charged the statutory crime of rape, and the information charged Albert Ramsey, while the indictment charged Berdett Ramsey, in that defendant was indicted and tried for the offense actually committed, and the only place where the name Albert really appeared was upon the endorsement which was no e sential part of the record, the name Albert in the indictment proper having been scratched out and Berdett substituted presumably before the administration of the oath.

The fact that in an information charging the defendant with the crime of rape, the additional

and mistaken allegations of force and that the carnal knowledge was against the will of the 13-year-old girl did not any the less make it the crime of statutory rape. The particular kind of rape committed by defendant would necessarily depend upon the proof adduced.

Motion for arrest of judgment.

R. H. Jackson, District Attorney, for Commonwealth.

Edward G. Coll for defendant.

November 14, 1917. REID, J.—Defendant was convicted of statutory rape upon the person of Pearl Adair, at the time of the trial aged about 13 years—and, according to the evidence, between 11 and 12 years of age when defendant first began his criminal relations with the girl.

Before going to trial defendant moved to quash the indictment on two grounds:

(1) That the information charged the common-law crime of rape, while the indictment found upon it charges the statutory crime of rape.

(2) That the information charges Albert Ramsey, while the indictment charges Berdett Ramsey.

This motion was refused and defendant, under the name of Berdett Ramsey, pleaded and went to trial.

If defendant were indicted for a more serious grade of offense than that charged in the information, he might well complain, but he was indicted and tried for the offense actually committed—statutory rape.

The inexperience of the magistrate, who mistakenly charged common-law rape, and the lack of knowledge of the father who made the information, thus embodying some erroneous statements, should not be permitted to prevent judgment against a defendant properly indicted upon the facts.

Especially is this true where, as here, the transcript of the magistrate shows that in the presence of the defendant, the witnesses for the Commonwealth, including the child in question, were sworn, and their evidence necessarily disclosed the details of the actual charge against the defendant, as being statutory and not common-law rape.

The information charged the defendant with the crime of rape committed upon the body of Pearl Adair, and charges the felonious carnal knowledge of the body of the child. The additional and mistaken allegations of force, and that such knowledge was against the will of Pearl Adair, did not any the less make it the crime of rape—statutory rape—and the particular kind of rape committed by defendant would necessarily depend upon the proof adduced.

In Commonwealth v. Dingman, 26 Supr. Ct., at p. 619, the question of the insufficiency of the information to support the indictment was raised. The opinion of the Appellate Court, Porter, J., thus states the principle: "The only question to be determined is whether the written accusation * * * sufficiently informed the defendant that he might be put on trial for the crime charged in the indictment. It is not necessary that an information shall charge the crime with the same detail and technical accuracy required in an indictment; if the essential elements of the offense be set forth in terms of common parlance, the information will be held sufficient."

The remaining ground is of no greater merit. An examination of the caption of the information shows that the defendant as Berdett Ramsey was charged with the offense—the name "Berdett" having been written by the magistrate over the name "Albert" presumably before the administration of the oath. The transcript of the magistrate's docket shows that the defendant's name was properly entered as Berdett Ramsey, without any erasure or change, and the recognizance of prosecutor, appended, shows the same name, as does also the entry following the caption, "names, residences and occupation of the defendant, bail and witnesses."

The only place in which the name Albert Ramsey really appears is upon the endorsement of the document. This endorsement, which is no essential part of the record, evidently misled the counsel for defendant.

The defendant, as Berdett Ramsey, was identified by the witnesses, including Pearl Adair, as the person charged with the offense. He, as Berdett Ramsey, went upon the stand and identified himself as living at Adair's, knowing and associating with Pearl Adair, giving her gifts, accompanying her to theaters and nickelodeons, as alleged by the prosecutor. There was no question at the trial about identity, and, as already stated, the information being really against Berdett Ramsey, there is no occasion for further discussion.

The motion for arrest of judgment is refused and the defendant is directed to appear for sentence at such time as the District Attorney shall require.

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OF CASES REPORTED IN THIS VOLUME

☛The Syllabi are numbered consecutively. The **black face figures** refer to these syllabi.

2. In a suit against defendant as accomodation endorser on a promissory note payable to plaintiff, an affidavit of defense is sufficient to prevent judgment which avers that the note was endorsed and delivered by defendant on a Sunday.—*Dowd & Co. v. Goodman* 177.

3. A note, bond or contract although executed on a Sunday, is nevertheless valid if delivered on a week day.—*Ib.*

4. Plaintiff's decedent deposited six hundred dollars payable to the order of himself or another (defendant), and received therefor a certificate of deposit. This certificate contained a proviso that the money belongs to the payees jointly, it being understood that either may withdraw on his or her individual order during their joint lives, and that any balance remaining upon the death of either shall belong to the survivor. After the death of the testator defendant presented the certificate to the bank and drew the entire amount, with interest. Plaintiff having brought suit therefor, the affidavit of defense set forth that the certificate of deposit was to be the absolute property of the defendant, subject to the condition that defendant would pay decedent's funeral expenses, and retain the balance as payment for the support and maintenance of the decedent. HELD, that a motion for judgment for want of a sufficient affidavit of defense must be overruled. —*Waltrick's Executor v. Hockensmith. No.* 2, 185.

5. The plaintiff's statement assuming that, as the money represented by the certificate of deposit was not drawn in decedent's lifetime it became part of his estate, the effect of the qualifying clause resulted in a gift contingent on the death of the donor, and the affidavit of defense setting up a contract and a delivery of the money in decedent's lifetime as a consideration, proof will be required by the plaintiff of the matters alleged in the statement. —*Ib.*

6. These conflicting theories and facts as stated by the pleadings, render it impossible for a Judge to decide from the pleadings alone.—*Ib.*

7. Defendant, within six days after judgment had been rendered against him, appeared before the Alderman with his bondsman, and asked for an appeal, tendering the costs of the transcript, and offering a bond for the debt, interest and costs. The Alderman refused to grant an appeal unless the costs already accrued were paid. Subsequently defendant again appeared at the Alderman's office, but the latter was absent because of sickness, and the twenty days expired without an appeal being taken. HELD, on a petition for a mandamus, that the petition must be granted.—*Emig v. Keystone Wire Cloth Company*, 139.

LATCHES IN TAKING.

8. Where a defendant in a suit before a justice of the peace fails to take an appeal within twenty days, and depositions show that he had notice of the case on the return day of the summons and made no effort to appeal until after execution issued, he is guilty of laches and an appeal *nunc pro tunc* will be refused.—*Live Stock Ins. Co. v. Patterson*, 103.

NOT GOVERNED BY PRACTICE ACT.

9. An appeal from the judgment of a justice of the peace is not an action "brought in a Court of Common Pleas," within the intent and meaning of Sec. 1, of the "practice act" of 1915 P. L. 483. The procedure therein provided does not apply to such appeals.—*Miller v. Satterley*, 121.

10. Rule 4 provides than an appearance *de bene esse* shall become general unless within ten days after the return of the writ the party entering the appearance shall file exceptions to said writ or to

82. Where services are rendered there is an implied contract to pay for them, excepting in case of parent and child, or where a condition of family relationship is shown to have existed.—*Ib.*

83. Family relationship is such living together in a common abode, that services may reasonably be expected by the recipient to be gratuitous, and may also be considered by the giver to be without the expectation of compensation.—*Ib.*

REMAINDER.

84. Where a married woman devised her real estate to her husband for life with remainder to charitable uses, and died without issue or known kindred, and the charitable uses failed, the husband took a fee simple estate and on his death it descended to his heirs. Section 12 of the Act of April 8, 1833, P. L. 313, prevented its escheat to the Commonwealth.—*Hunkley's Estate*, 107.

85. Affirmative and convincing proof ought to be furnished to the Court that the applicant for a detective license has the proper qualifications.—*Roth's Petition*, 149.

PROCEEDS OF ATTACHMENT.

86. On distribution of the proceeds of an attachment the amount of a protested note held by a bank on which the defendant in the attachment is endorser can not be set off against and deducted from the dividend allowable on a claim of the maker, who is insolvent, against the defendant, and awarded to the bank in full payment of the note A regular dividend should be allowed on the note and credited on the full claim of the maker against the defendant.—*Farmers' National Bank of Lititz v. Hertzler*, 97.

PROCEEDS OF MORTGAGE.

87. The real estate of defendant was sold upon foreclosure of a mortgage, executed prior to the Act of June 4, 1901, P. L. 364. Claims for Township, School and County taxes were filed with the Sheriff. The Sheriff distributed the entire proceeds, which were less than the amount of mortgage to the plaintiff. HELD, upon exceptions to the Sheriff's distribution, that the plaintiff's mortgage had priority in distribution of the fund.—*Yost v. Yeakle*, 135.

PROCEEDS OF INSOLVENT CORPORATION.

88. A, an officer of C, the insolvent corporation, as an agent for B, sold and delivered to C a press and other material with the understanding that B was "to carry" the machinery so sold until it was "convenient for C to pay for it." Subsequently A, as an inducement for S and M to purchase stock in the corporation stated to them that the equipment of the plant was entirely free of debt. Before the auditor distributing the balance on the account of the receiver of C, B claimed the full purchase price and the auditor awarded him a dividend thereon. On exceptions filed, HELD, that in the absence of any testimony to show that A had been authorized to make such untrue declaration, that the exceptions must be dismissed.—*Hardnett Company v. Poultry Fancier Publishing Company*, 169.

89. A agreed to sell his stock in the C company to the company for a fixed sum, part to be paid in cash and the balance in installments, secured by judgment On receipt of the cash he sent the stock to the secretary of the company with instructions to hold the same until the judgment was secured. C refused to give the judgment and after some correspondence expressed its willingness, by its attorney, to declare the whole thing off but directed the secretary to hold on to the stock. Before the auditor, A claimed the balance of the purchase price. HELD, that exceptions to the allowance of the claim must be dismissed.—*Ib.*

89a. E, as attorney, successfully resisted the payment of claims amounting to $1227.12. HELD, that an allowance of $300 to him out of the fund for distribution, will be sustained.—*Ib.*

90. D advanced to the corporation $3,000 to pay for the stock of A, under an agreement that $3,000 worth of stock was to be transferred to him. By reason of the failure of the corporation, acting under his advice, to give the judgment desired by A, the stock was never delivered to the company, or any part to him. The auditor found that his partic-

offices were in New York City, and that it had a place of business in Lancaster County, and further prayed that service might be made at those places. The petition was granted and service made, whereupon defendant moved to have it set aside. HELD, that the motion must be granted.—*Vandersloot v. Pennsylvania Water & Power Co. No. 2.*, 157.

106. The bill makes it plain that the defendant was lawfully incorporated under the laws of the State of Pennsylvania; if it has not properly or legally pursued its franchise as conveyed to it by the act of incorporation there exists some remedy at law; either by ejectment proceedings, or otherwise, according to the irregular or illegal encroachment.—*Ib.*

107. It is quite plain from a perusal of the amended bill that the ultimate object of the plaintiff is to have this Court make an order which in effect would be to change the purpose for which the dam was constructed, presumably in accordance with its corporate rights.—*Ib.*

108. As only a small portion of the dam is in this county the Court has no authority to direct service of process upon a non-resident—*Ib.*

109. Plaintiff below (appellee) presented his petition, alleging that while the lands, tenements and hereditaments concerning which suit was brought are located in York County, the defendant corporation had no office or place of business in actual operation in said county; but averring that defendant's business offices were in New York City, and that it had a place of business in Lancaster County, and further prayed that service might be made at those places. The petition was granted and a motion to set aside the service was subsequently denied. HELD, to be error.—*Pennsylvania Water and Power Co.'s. Appeal*, 42.

110. The Act of April 6, 1859, P. L. 387, does not apply to persons or property outside the jurisdiction of the court.—*Ib.*

111. Having entered a conditional appearance, defendant had a right to appeal from the order refusing to set aside the service out of the county.—*Ib.*

112. The court fell into error by relying exclusively on the averments in the bill, and failing to take into account the controlling importance of the prayers for relief.—*Ib.*

NUISANCE.

113. Plaintiff's bill set forth the proposed erection of a public service garage by defendant, the injuries that would result therefrom to their respective properties, and prayed for an injunction. Defendant demurred, contending that no injunction could be issued in advance of the erection of the garage; that the question of whether or not it was a nuisance must first be determined by an action at law; and asked for a jury trial. HELD, that the demurrer must be dismissed and the prayer for a jury trial denied.—*Niles et. al. v. Richley*, 94.

114. The allegations that the proposed garage, if it should be erected, would necessarily become a nuisance; that it would interfere with the safe and quiet use of plaintiff properties, and of the streets and sidewalks adjacent thereto; and that it would interfere with divine services in a nearby church, (one of the plaintiff's,) if fullly proven, entitle the plaintiffs to equitable relief, because of the inadequacy of an action at law as a remedy for such injuries.—*Ib.*

115. On a suit to recover balance owing by defendant on his purchase of plaintiff's interests in a certain company, where the amount of defendant's down payment is in dispute, and it is shown that defendant, in a letter written to R, whose interests in the same company he had also purchased, admitted the down payment to be as alleged by plaintiff, an offer by defendant to prove that the letter was so written at plaintiff's instance in order to deceive R, is objectionable both on ground of immateriality and also as tending to introduce a collateral issue.—*Allen v. Nichter*, 77.

116. That defendant at the time of his purchase borrowed money sufficient to make such down payment as he alleged, is irrelevant, when plaintiff was neither a party nor privy to the transaction.—*Ib.*

117. Section 9 of Act April 21, 1915, P. L. 146, prohibiting the breeding or selling of ferrets, or having such animals in possession, except by license

of her husband." The defendants were not alleged to have been tort-feasors, neither was any concert of action averred or shown. The testimony clearly showed that the husband defendant was not an active tort-feasor; that he did not either actively or passively participate in the alleged assault by his wife upon plaintiff; that he was not present when it occurred and that when he returned his only act was to take or pull his wife away from the scene. HELD, on a motion to take off compulsory non-suit that "upon the record as it stood at the time of the trial, and upon the plaintiffs' evidence, no verdict could have been properly rendered against anyone." —*Elkins v. Rosenberger*, 142.

MAINTENANCE.

129. When a son purchased an improved town lot, for his own use, with money in part borrowed from his mother on his oral promise to repay the same in certain installments, and caused the deed to be made in the mother's name as grantee, but without her knowledge or request, and for several years lived on the premises in undisputed possession, paying taxes and insurance, HELD, that the mother merely holds the legal title as trustee, while the beneficial ownership is in the son, and as such the property is liable to seizure for his debts, or other liabilities in the nature of debt, when reduced to judgment either at law or in equity.—*Jayne v. Jayne et al.*, 35.

130. In an action in equity where it is shown that such beneficial owner had wilfully deserted his wife and child without reasonable cause, removed to another state, and thereafter wholly neglected to provide for their maintenance, and he is directed to make certain monthly payments to the wife, the property may, in default of such payments, be seized and sold to recover the amount so awarded, and both mother and son be enjoined from disposing of or encumbering the same pending the sale.—*Ib.*

131. As to what standing, if any, the mother may have to reclaim an unpaid balance of the loan out of the property, in absence of any agreement relating thereto, is a question to be determined on the distribution.—*Ib.*

132. Where one under sentence to pay his wife three dollars per week for the support of his wife and daughtered petitioned the court for modification of the order, and it was made to appear that since sentence was imposed he was divorced and that the daughter had attained the age of fifteen years and was earning from three to three and a half dollars per week as wages, the court reduced the amount of the weekly payment to two dollars.—*Com. v. Rodman*, 150.

BENEFICIAL ASSOCIATION.

133. Judgment will be entered for plaintiff in an action by a beneficiary under a beneficiary insurance policy where the defense was that plaintiff did not belong to any of the classes designated as possible beneficaries under the constitution and by-laws of the association, and it appeared that all premiums had been paid regularly and decedent was in good standing at the time of death, and there was no evidence to show that plaintiff was not the beneficiary named on the books of the lodge.—*Green v. Supreme Lodge Knights and Ladies of Honor*, 31.

134. There is no rule or law that prevents a beneficial insurance association from waiving any of the provisions of its constitution or by-laws, if it sees fit so to do.—*Ib.*

LIFE.

135. In an action on a policy of life insurance, where the defendant sets up alleged false answers as to the excessive use of spiritous liquors, and as to prior diseases, and as to the attendance of a physician, and all these facts are contradicted by witnesses who knew the decedent, and were in a position to know the facts as to his use of liquors, and as to his health, the case must be submitted to a jury.—*Bednar's Admr. v. Prudential Insurance Co.*, 81.

136. The use by a brewer of certain markings of his beer kegs in unnecssary and exact imitation of the markings used by a rival brewer for many years

fense alleging that the title of the land will come in question; the defendant tendered half the costs but refused to enter into recognizance as required by the Act of July 2, 1901, P. L. 608; after judgment for plaintiff a transcript was filed in the Common Pleas and a statement was served to which a plea of not guilty was entered; a rule was entered to amend the plaintiff's statement to claim damages to the amount of $2,500.00 instead of $300.00. HELD, the rule must be discharged.—*Reinbold v. Myers*, 70.

150. The Act of March 22, 1814, 6 Sm. 182, conferred jurisdiction on Justices of the Peace in actions of trespass brought for the recovery of damages for injury done or committed on real or personal estate in all cases where the value of the property claimed or the damages alleged to have been sustained shall not exceed one hundred dollars and the Act of 1879, P. L. 194, increased such jurisdiction to three hundred dollars.—*Ib.*

151. The Act of July 2, 1901, P. L. 608 provides that in cases where the title to land comes in question the Justice shall not dismiss the suit but transmit a copy of the record to the Prothonotary of the county who shall enter the same on his docket and the suit shall proceed as if originally brought in the Common Pleas; this act does not increase the amount of the jurisdiction of the Justices and the amount cannot be enlarged after the case is in the Common Pleas and the statement cannot be amended so as to show an action for a larger amount than that before the Justice.—*Ib.*

PRACTICE.

152. After hearing the evidence, the Justice of he Peace, according to defendant's witnesses, said he would inform the parties when he rendered his judgment; the plaintiff's witnesses testified that the Justice said he would render his opinion on a fixed day. Judgment was duly given on that day, the defendant being absent. The defendant presented his petition sir months later, asking for a rule to file an appeal *nunc pro tunc;* but the Court below, Ross, J., refused the appeal. HELD, that the judgment must be affirmed.—*Troupe's Appeal*, 53.

153. In a suit before a Justice of the Peace, before any testimony was heard, defendant filed an affidavit setting forth that the title to lands may and will come into question." Notwithstanding, the Justice proceeded with the case, defendant offered no evidence, and judgment was entered for the plaintiff. On certiorari, HELD, that the proceedings must be set aside.—*Lerew's Executors v. Bentzel*, 67.

LACHES, 121-122, 176.

IN TAKING APPEAL, 8.

LAND, CHARGE ON, 310.

LANDLORD AND TENANT.

154. Plaintiff occupied a suite under a monthly lease from her landlord, directly below a suite with kitchenette, occupied by another party, and brought suit against defendant to recover damages done by water trickling down from said suite above her, into her clothes' closet. The ground of recovery, as set forth in the statement, being the alleged negligence of the defendant landlord, the trial judge, holding that the relation of landlord and tenant having existed, entered a compulsory non-suit, which it subsequently refused to remove.—*Yost v. Hamilton Apartment Co.*, 125.

155. As regards the liability of landlords to third persons, the tenant and not the landlord is liable to third persons for accidents and injury occasioned to them by the premises being in dangerous condition.—*Ib.*

156. A lessee cannot recover damages from the lessor in an action of trespass for unlawfully entering upon the demised premises and depriving him of the use thereof for a certain period during which the building was being lowered to comply with a new grade established by a city ordinance when the work was under the control of an independent contractor.—*Hern v. Maeder*, 61.

157. A lessor is not liable in damages for inconveniences to his tenants where the inconvenience was caused by the work of a contractor, who employed his own methods and men in lowering a building to comply with a new grade of a city street, when the lessor had no control over the work, and there is no evidence that the lessor knew or might have known, from reasonable inquiry, that his contractor, in doing the work committed to him, would infringe on any of the rights of his tenants.—*Ib.*

158. A municipality is not liable in damages to a lessee in a building lowered to comply with a grade, where the inconvenience and damage complained of was not the change of grade, but the lowering of the building to comply with the grade.—*Ib.*

159. In an action in assumpsit by two heirs of an estate against one who had occupied part of a building for several years under a lease with all the heirs for an adjoining building, it is no defense to claim that he received no notice and knew nothing of a partition proceeding whereby the real estate of an estate had been apportioned and the plaintiffs had been awarded the property for which a claim was made since the partition, and a verdict for plaintiff will not be disturbed.—*Sutmeyer et al. v. Thornton*, 82.

161. In the absence of a special agreement, a tradesman has a lien for work done on goods deposited with him for manufacture.—*Gorli & Co.. v. Perfect Silk Throwing Co.*, 9.

162. Where there is a contract to manufacture several articles at an agreed price, the tradesman has a lien upon any one or more of the articles in his possession for labor bestowed upon other articles embraced in the contract.—*Ib.*

163. Where under a contract for finishing goods for manufacture by lots, it is disputed as to whether or not several separate shipments comprise a single lot, the question is for the jury.—*Ib.*

164. Plaintiff, a duly incorporated orphanage, sued out, in its own name, a writ of mandamus to compel defendant school district to furnish schooling to certain of its minor inmates, under the Act of May 9, 1913, P. L. 192. The defendant moved to quash the writ, because plaintiff was not a partly beneficially interested in the enforcement of the law. HELD, that the writ must be quashed.—*Messiah Orphanage v. Monaghan Twp. School District.*, 141.

165. Plaintiff is not pecuniarily interested in the enforcement of the School Board's alleged public duty, as the cost of such tuition would be payable by the several school districts in which the respective children have their legal residences.—*Ib.*

166. Nor has it such a beneficiary interest, or is it such legal representative of the personal interests of these children, as will entitle it to sue out a writ of mandamus in its own name.—*Ib.*

167. The Act of May 9, 1913, P. L. 192, provides that when an alternative writ of mandamus is sued out "to procure the enforcement of a public duty," the proceedings shall be prosecuted in the name of the Commonwealth on the relation of the Attorney General or of the District Attorney of the proper county, as the case may require.—*Ib.*

168. Plaintiff sued to recover damages for the sale of her property, under an execution against her husband. At the trial the evidence showing the purchase of the property by the plaintiff, due notice of such ownership given to the defendant and ample opportunity for defendant to ascertain the truth of such claim before the day of sale, the jury found for the plaintiff the amount for which the mules were sold at the sale, interest and fifty dollars damages. On a motion for new trial, on the ground that there was no evidence to support the verdict for punitive damages, HELD, that the motion must be refused.—*Tyson v. Tyson*, 193.

169. There was admitted in evidence the note given by plaintiff at the time she bought the mules, receipt for the payment of the same and statements of the party from whom she bought the mules. HELD, not to be grounds for a new trial.—*Ib.*

170. These papers and statements were not offered as complete and conclusive evidence of ownership, but as corroborative of plaintiff's direct testimony on the subject.—Ib.

171. In order to decide with accuracy upon the character of any phenomenon or transaction we must know all the facts of which it consists, and all the circumstances that are truly connected with, and influence it. —*Ib.*

PRACTICE.

APPEAL FROM JUSTICE OF PEACE, 9.

DUPLICATE PETITIONS, 294-296.

AFFFIDAVIT OF DEFENSE.

226. The affidavit of defense to a suit to recover balance due on a contract set forth a counter claim for damages resulting from a stoppage of defendant's mill in order to repair constructive defects in plaintiff's work. Plaintiff moved for judgment for want of a sufficient affidavit of defence. HELD, that the motion must be refused.—*Sturtevant Company v. York Card and Paper Company*, 133.

227. Under the Practice Act of 1915, a counter claim in the affidavit of defense must be met by an answer, raising either a question of law or of fact.—*Ib.*

228. A motion for judgment for want of a sufficient affidavit of defense cannot be used as a substitute for an answer.—*Ib.*

229. When the statement, affidavit of defense, or any other pleading is formally defective and not in conformity with the provisions of the Practice Act of 1915, the Court should be moved to strike it off.—*Ib.*

230. The contract in suit contained a clause providing that plaintiff shall not be held liable "in any event for any special, indirect or consequential damages whatsoever." HELD, that such clause would not relieve from liability for loss by reason of wages of idle employees, and similar expense during the necessary stoppage of a mill for repairs to defective machinery.—*Ib.*

231. A proper amount of "overhead expenses" has been held recoverable during the necessary stoppage of work for repairs.—*Ib.*

232. An item of loss in reduced product, indicating a loss of profits, is not necessarily excluded as special and indirect under the clause of this contract relied upon by the plaintiff.—*Ib.*

PLAINTIFF'S STATEMENT AND PLEADINGS.

233. Plaintiff's statement, in numbered paragraphs, set forth that the contract was in writing; that plaintiff resided in York; that defendant was a beneficial association in York; decedent's membership and death; designation of plaintiff as beneficiary; authority for such designation: notice and proof of death and failure of payment by defendant. HELD, that a motion to strike off the statement as not in conformity with the Practice Act of 1915 must be refused.—*Ruth v. I. O. R. M.*, 153.

234. Where the plaintiff's statement is uniform and clear, every defence whether of fact or of law, must be clearly set up in the affidavit of defence.—*Ib.*

235. Allegations that the statement "presupposes and rebuts theories of the defence," and that to answer the statement would require the defendant "to divulge its entire defence, to answer matters that may not be material to the issue and to argue matters that are questions of evidence," are beyond comprehension and cannot be considered at this time.—*Ib.*

236. After the expiration of the term at which judgment on demurrer was entered for defendant, plaintiff asked for leave to amend the statement. HELD, that the amendment must be refused.—*Glatfelter v. American Phosphorus Co., No. 2*, 69.

237. Where a demurrer to a statement of claim has been sustained and judgment has been entered for the defendant, no amendment can be allowed until the judgment has been opened or vacated.—*Ib.*

238. An application to open or vacate a judgment entered adversely, after a hearing or trial, must be made before the end of the term at which the judgment is entered.—*Ib.*

239. The law controling the opening or vacating of adverse judgments has not been changed by the Practice Act, 1915.—*Ib.*

240. Under the Practice Act of May 14, 1915, a statement is not defective in that it does not set forth the contract on which the plaintiff depends and whether it is oral or written, where the action is founded on a tort and the material facts are set forth in concise form.—*Sorrick v. Scheetz*, 25.

241. The practice Act of May 14, 1915, P. L. 43, presupposes an action already brought in the Court of Common Pleas. The statement is the first step in the procedure when the action has been commenced.—*American Lumber & Mfg. Co. v. Ensminger Lumber Co.'s Receivers*, 7.

242. Service of the statement is recognized and authorized by neccessary implication.—*Ib.*

243. There is no prohibition against filing the statement before the return day, and defendant thus may be compelled to file an affidavit of defence before the return day or before he is in Court pursuant to the writ of summons.—*Ib.*

244. Service of statement of claim may be made by serving a copy on defendant.—*Ib.*

245. Receivers of U. S. District Court may be sued without first obtaining leave of Court.—*Ib.*

246. A statement that is not divided into paragraphs, as required by the Act of May 14, 1915, P. L. 483, will be stricken from the record in that it does not comply with the Practice Act.—*Confer v. Smith*, 130.

263. Where an executrix accepts a promissory note made to her individually by a debtor of the estate, she may sue upon the note either individually or as executrix.—*Beam v. Richard et al.*, 147.

264. Where the subject of a suit is a promissory note given by defendant to an executrix in payment of a debt due the decedent, the testimony of the executrix is competent to show the consideration by stating what was said to her by the defendant at the time the note was given. The Act of 1887 does not apply, as the giving of the note was a transaction between the witness and the defendants, and not between the decedent and the defendants.—*Ib.*

265. In such a case the testimony of the defendant that she was not indebted to the estate of the decedent is incompetent, since such testimony would relate to transactions between the witness and the decedent, and fall within the provisions of the Act of 1887.—*Ib.*

266. The receivers of a bank have no rights greater than or different from those of the bank itself at the moment of the creation of the receivership, and those were the rights, fixed by law, at the time the depositor became insolvent, so that a deposit in a bank could not be set-off against a note held by the bank, said note not being then due.—*Com. ex rel. v. Pittsburg Bank for Savings*, 114.

267. It was immaterial whether the bank went into the hands of a receiver before suit entered against the bank. The receivers of the depositor were entitled to dividends awarded other depositors and exceptions to an auditor's report refusing such dividends sustained.—*Ib.*

268. The mutual rights of debtors and creditors of an insolvent corporation become fixed as of the day when receivers were appointed.—*Ib.*

269. The receivers of an insolvent company were entitled to receive a bank deposit as of the time of their appointment and this deposit cannot be set-off against a note not then due. They were bound to pay the note when it becomes due, or such dividend as the assets of the company would afford. The appointment of a receiver for the bank would not change these rights.—*Ib.*

270. The question whether a bond accompanying a mortgage, after being filed in the prothonotary's office and before entry of the usual notation on the continuance dock, had been altered by the addition of certain words restricting the lien of the judgment to the specific lands bound by the accompanying mortgage, is one of fact for a jury, and cannot be determined by the court on motion to correct the record.—*Weiland v. Weiland*, 18.

271. The register of wills has jurisdiction in all matters relating to letters which have been issued improvidently; error in the name of the decedent may be corrected by him.—*Smith's Estate*, 151.

272. One who exercises his right to a lien on an automobile for repairs and storage, can not give a counter bond and retain possession of the same in case of replevin by the owner. His claim is protected by the bond given by the owner.—*Shreiner v. Kauffman*, 122.

273. Neither a rule to bring ejectment under Act April 16, 1903, P. L. 212, nor a petition for an issue under Act June 10, 1893, P. L. 415, is an appropriate remedy to settle title of land, where

the petitioner's right, if any, arises from a parol promise by the holder of the legal title, tending to establish a resulting trust in her favor. The petitioner should proceed by bill in equity to first establish the resulting trust claimed in her petition.—*Joyce's Petition*, 37.

ROADS AND HIGHWAYS.

274. An exception was filed to the report of road viewers because "The supervisors of the township were not given notice as provided by law." HELD, that the exception is fatal.—*Road in Hellam Township*, 205.

274a. A further exception was filed on the ground "that the road was not laid out with reference to the plot of the Borough, or to the general arrangements, convenience or advantage of the Borough." HELD, to be fatal to the proceedings.—Ib.

275. Petitioners asked for an attachment against the township supervisors for failure to open a public road according to the width set forth in the viewers' report and fixed by the court. HELD, that an attachment will not lie.—*Road in East Manchester Township, No. 2*, 182.

276. Neither the general road laws nor the York County Act of February 17, 1860, P. L. 61, with its supplements, give any express statutory authority for the issuing of an attachment to enforce obedience to the order of the court, in road cases.—*Ib.*

277. The supervisors, as such, are required to open a road as soon as practicable after the order of the court, and they have no discretion in the matter.—*Ib.*

278. A delay of about fifteen months makes a clear case for the exercise of the court's authority for the enforcement of the order.—*Ib.*

279. An indictment of the supervisors for failure to perform their duty is the proper remedy.—*Ib.*

280. On petition viewers were appointed to vacate a public road, and reported that "the part of the road proposed to be vacated has become useless, inconvenient and burdensome," and "there is no occasion for a public road between the termini set forth in the petition and order of court." Exceptions were filed to the report on the ground of the indefiniteness and insufficiency of the petition and report. HELD, that the exceptions must be dismissed.—*Road in Carroll Township*, 200.

281. As the report set forth the holding of a public meeting at which all parties, with their counsel, were present, and was accompanied by the testimony of witnesses under oath, the report, as a whole, was clear and intelligent enough to withstand the exceptions filed thereto.—*Ib.*

282. The petition having set forth that the road is a public road, it is no ground for an exception in that it is not stated how it became such.—*Ib.*

283. The sworn facts in the viewers' report, without legal refutation, must be assumed to be true. *Ib.*

284. If it is not such a road as is properly within the jurisdiction of this court, it is incumbent on the objector to show that fact.—*Ib.*

285. The petition for the opening of a new road not only gave the termini, but marked out the route over which the proposed road was to be constructed, and the names of the owners of the land through which it was to pass. HELD, that the report must be set aside.—*Road in East Manchester Township*, 168.

286. The petition for the view lies at the foundation of all the subsequent proceedings, and can do no more than state the beginning and ending..—*Ib.*

SALE.

CONDITIONAL, 20.

287. Judgment was entered for defendant where it appeared in replevin that defendant purchased an automobile from one who had failed to make all the payments or comply with the conditions of an agreement, of which defendant had no knowledge, when the agreement upon which the original sale had been made in another state, was a conditional sale and not a lease.—*Jones & Whitaker v. Kunkle*, 137.

288. In an instrument, providing for the sale of an automobile and the payment of installments for the unpaid balance of the purchase money, the words "lessor" or "lessee" were not used, but the parties were designated as "seller" and "buyer" and the word "rent" as used was equivalent to "liquidated" damages, and it was not clear that a bailment was intended, the court on a rule for want of sufficient affidavit of defense in replevin determined that it was a conditional sale and not a bailment, discharged the rule and entered judgment for defendant.—*Ib.*

289. An agreement to lease and demise a certain oven for a term of eight months, with covenant for surrender of the property at the end of the term, coupled with an option to buy at that time for a stated sum if the rent should then have been paid, the amount received as rent in that case to be applied as purchase money, is a contract, of bailment, and cannot be made to operate as a sale at the time of its date, in the absence of anything to either impeach or vary its terms.—*Johnson Co. v. Pryor et al.*, 93.

290. Where the property so leased was taken in execution and sold by the sheriff within eight

said tract of land shall be sold and the proceeds thereof divided among the surviving devisees, named in this will in equal shares." Part of this tract was taken by a railroad company in condemnation proceedings, and after the death of the life tenant the fund came into court for distribution. The auditor distributed one-third of it among the next of kin, legatees and personal representatives of "the other devisees" named in the will, which report was confirmed by the court below, Wanner, P. J. HELD, that the decree must be confirmed.—*Fetrow's Estate. No. 3*, 51.

309. The clause "with this provision that they pay unto the other devisees named" in the will, was a condition imposed upon the passing of the fee and chargeable upon the land.—*Ib.*

310. If it appear from the language of the will that the testator intended to couple the payment of the legacy by the devisee with the devise of the land, so that payment is to be made because or as a condition on which the devise has been made, then the real estate is in equity chargeable with the payment of the legacy.—*Ib.*

311. If the devise of the land, upon which the legacy is charged, becomes vested either in possession or in interest immediately upon the death of the testator, and by the terms of the will is given subject to the payment of the legacy, the legacy must be considered likewise vested; and if the legatee should die before it becomes payable it will pass to his or her representatives; because in such a case it is plain, from the terms of the will, that the legatee was as much the object of the testator's bounty as the devisee, and that the testator intended that the latter should take the land *cum onere*.—*Ib.*

312. The value of the charge on one-third of the land devised was to be determined at the time when it was to be paid.—*Ib.*

313. The devisees, although receiving the fee, could not enjoy the use of it until the death of the life tenant and then when they entered into the enjoyment of the estate, the means of paying the legacy became theirs.—*Ib.*

314. Where a decedent left by his will all of his property to his widow for life with power to use the principal, or sell or encumber the real estate if necessary for her maintenance, a promissory note given by her for money borrowed will not be paid out of his estate after her death.—*Hahn Estate*, 131.

315. The legal sufficiency of a writing alleged to be a will constitutes a question of fact which is sufficient to award an issue to be determined by jury.—*Egan's Estate*, 206.

316. Decedent, prior to his death, received payment of a legacy, from the estate of his step-brother under the following clause of the latter's will: "I give and bequeath to my step-brother, James S. Stepp, the sum of $400. The above sum to be paid to him within one year after my decease, and should he die without heirs the above sum shall fall back to the children of my son, John H. Stepp." Decedent died without children, and the heirs of John H. Stepp claimed the amount of the legacy out of his estate. HELD, that the words "die without heirs" must be construed to mean death without heirs during the lifetime of the testator, and that decedent took the legacy unconditionally.—*Stepp's Estate*, 80.

317. HELD, also, that the words "to be paid within one year after my decease," referred merely to the time of payment in case decedent should survive the testator, and that decedent took the legacy unconditionally.—*Ib.*

318. Testator bequeathed the residue of his estate "to my brothers and sisters, or their heirs, in equal shares, the child or children of any deceased brother or sister to take by representation of his, her, or their parents." The auditor distributed the fund of the surviving brother and sisters and to the children of a deceaced brother and sister. HELD, that exceptions filed to his report must be dismissed.—*Martin's Estate*, 106.

319. The contention that the testator meant to give his estate only to the child or children of such brother or those sisters who were living at the time he executed his will cannot be sustained.—*Ib.*

320. A study of the whole will and the language used by the testator impels the conclusion that the testator did not intend to exclude the children of any of his deceased brothers or sisters from the share which their deceased parent would have been entitled to had they survived him.—*Ib.*

321. Testatrix bequeathed by one clause in her will specific portions of sums deposited in three banks which she named, to a sister and a nephew, and in the same clause willed, "and the remainder in the banks to my brother." She had funds deposited in two other banks. HELD, that the brother took only the balance in the three banks specificially named in that clause.—*King's Estate*, 108.

322. F. devised the "remainder of the share or each child" to his executors "in trust * * * the income as it accrues to be paid to each child * * * and at the death of either child the principal shall go to his or their then surviving children." One of the legatees becoming bankrupt, the trustees sold her interest and the auditor distrubuting the accumulated income in the hands of the trustee, awarded the same to the purchaser. Exceptions being filed to such award, HELD, that the exceptions must be dismissed. *Frey's Estate. No. 2*, 103.

makes such an act criminal and a misdemeanor, will not relieve the employer from being compelled to compensate decedent's dependent widow, as the Workmen's Compensation Act of June 2, 1915, P. L. 736, makes no distinction in the degrees of negligence, and, being remedial legislation, should be broadly and liberally construed.—*Ib.*

338. An employe is within the Workmen's Compensation Act of 1915, and he or his dependents are entitled to compensation where an accident happens while an employe is waiting for a tool or material, ready to renew his work as soon as that is furnished to him. He is at that time engaged in the furtherance of his employer's business. The time is uncertain. He must be always ready and this act of waiting that there may be some person at hand to continue the work at the proper time is a part of the service which the employe is rendering to his employer.—*Dzikoska et al. v. Superior Steel Co. et al.*, 67.

339. It is no defense under the Workmen's Compensation Act of 1915 to a claim for compensation on the ground that the employe was not actually engaged "in the furtherance of the business or affairs of his employe" in a case where, during an indeterminate period of waiting for the arrival of steel to be loaded on trucks, the employe was seen to emerge from a nearby box car with his clothes on fire, and he died as a result of the burning, in that he had not been called off from work, and in renewing his work, would not be called back. He was there ready to work as soon as the material was ready for his hand and during that period was actually engaged in the duties of his employer. —*Ib.*

340. Under the Workmen's Compensation Act, claimant, widow of decedent, who was not living with her husband at the time of his death and was not actually dependent upon him for support, but was depending entirely upon her own earnings for her support, is not entitled to compensation, and a finding by the referee to this effect will not be disturbed on appeal.—*Vargo v. Carnegie Steel Co.*, 95.